

REFEREE DETERMINES ISSUES OF MISLEADING AND DECEPTIVE CONDUCT

Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd
NSW Supreme Court
Barrett J

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The New South Wales Supreme Court on 3 September 2001 in the matter of *Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd* [2001] NSW SC 752 upheld a referee's decision to award \$2,874,817 damages against a principal who failed to disclose a material fact prior to entering into a building contract.

THE FACTS

Abigroup Contractors Pty Ltd ('Abigroup') and Peninsula Balmain Pty Ltd ('Peninsula') entered into a contract on 20 March 1998 for the performance by Abigroup of construction works for Peninsula's development at Balmain. Abigroup did not know that the party proposed as superintendent by Peninsula was, by agreement, constituted the agent of Peninsula in all matters related to the project.

THE PARTIES' CLAIMS

Abigroup claimed that Peninsula had contravened s.51AA and 52 of the *Trade Practices Act 1974* ('the Act') by failing to disclose to Abigroup when the contract was made the existence of an agency agreement pursuant to which the superintendent was Peninsula's agent in all matters relating to the design and construction of the project. As a result, Abigroup contended that Peninsula and the superintendent were unable to act in accordance with the term of the contract because, in effect, the superintendent 'stood in the shoes' of Peninsula when making any decisions or in issuing any instruction or certifying any matter.

Abigroup claimed a total of \$6,823,852 representing its reasonable costs as a consequence of entering into the contract, less what it had been paid. In the alternative, Abigroup sought payment for contract works, variations and delay costs totalling \$4,916,411.

Peninsula cross-claimed for liquidated damages in the sum of

\$1,262,308 for late completion and in the alternative the sum of \$8,420,241 representing Peninsula's costs to complete the project and additional marketing and holding costs, interests and delayed return on investment.

THE PROCEEDINGS

The proceedings were commenced in September 1999.

On 2 December 1999, Justice Barrett ordered by consent that the whole of the proceedings be referred to a referee for enquiry and report. The court received the referee's report in February 2001.

THE REFEREE'S FINDINGS Misleading and Deceptive Conduct

The referee found that Peninsula's conduct in entering into the agency agreement, and its failure to disclose that agreement to Abigroup, was a misrepresentation and breach of s.52 of the Act and that if Peninsula had disclosed the agency agreement, Abigroup would not have entered into the contract or would have done so only after it had been amended.

The referee also found that the action of Peninsula engaging the superintendent to act as its agent was a breach of cl.23 of the contract, which obliged Peninsula to ensure that the superintendent acted fairly and honestly.

Extension of Time

The referee found that the superintendent should have extended the date for practical completion, as a consequence of delays caused by Peninsula and the superintendent. Accordingly, the referee extended the date for practical completion.

Subject to the determination of the consequences of the findings on s.52 and cl.23, the referee determined:

- that Abigroup was entitled to approximately \$2.5M in respect of

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its claims for variations and delays. However, the referee found that Abigroup failed to proceed with the works with due expedition and without delay.

- that Peninsula was entitled to \$1,342,500 in liquidated damages and \$1,780,782 as its reasonable costs to complete the works.
- that on balance, Peninsula was entitled to a net sum of \$656,435.00 from Abigroup.

Both parties challenged the referee's findings.

The Court Review of the Referee's Decision

Justice Barrett said that when considering the referee's findings the issue is whether there are grounds from which it is open to the court to depart from the findings of the referee and, if so, whether it should do so.

His Honour accepted the referee's findings of fact, and particularly the finding that had Abigroup been aware of the agency, it:

[Would] not have entered into the contract or would have done so only after it had amended on some mutually agreed basis.

It was accepted that the duality in the role of superintendent is well recognised. Generally, the superintendent has a relationship with the principal, which requires a superintendent to promote the principal's interests. However, His Honour said:

There is a clear expectation on both sides that those functions will be performed fairly and with a due measure of impartiality in order to give proper effect to the contract.

His Honour then went on to consider whether Peninsula's silence concerning the existence of the agency agreement with the superintendent may be misleading and deceptive conduct within s.52. He noted that the thing that makes silence unacceptable is the

existence of surrounding circumstances giving rise to a rational expectation that information of some kind will be volunteered. The relevant notion is not one of a legal duty to warn. Nor are ordinary commercial negotiations and the driving of hard bargains qualified by some overriding duty to be solicitors of the welfare of one counterparty. The quality and effective silence are to be judged wholly by reference to the nature of the surrounding circumstances.

In the circumstances His Honour considered that it was understandable that Abigroup (or any other reasonable person in its place) should have taken the view that a superintendent which was the agent of the principal in all matters concerning the project stood on quite a different commercial plane from one which was not such an agent. The undisclosed agency was a material consideration in the decision to accept a contract naming the agent as superintendent. Peninsula's conduct was therefore misleading or deceptive and the referee's finding in that respect was fully justified.

Declaring the Contract Void

Though such relief was not sought, His Honour thought that it was appropriate to consider this question as it would be instructive in determining the appropriate relief.

His Honour said that an assertion that a party misled would have entered into a different contract if in possession of the true facts must be approached with considerable caution. The referee's finding that, had Abigroup been aware of the existence and effect of the undisclosed agency agreement, it would have insisted on revisions before committing to the contract, was put to one side, as His Honour considered it appropriate to approach the matter by reference to the actual contract alone.

His Honour noted that s.87 of the Act would have been a clear source of power for the court to make an order declaring the contract between Peninsula and Abigroup to be void ab initio. Given the nature and effect of the misrepresentation by Peninsula, as examined above, and the referee's express finding that Abigroup would not have entered into this contract if aware of the true position, this would have been an appropriate case for making such an order.

His Honour went on to say that once a contract of this kind is seen to be void ab initio by force of the Act it is to be regarded as if it had never been in force:

[T]he whole of its liability framework falls away and there is no contractual measure according to which the remuneration to which the contractor is entitled to for work done may be determined.

This then opens the matter for restitutionary principles to operate.

The referee had expressed the opinion that the reasonable remuneration of Abigroup upon a quantum meruit after allowing for sums already received was \$2,874,817.00. His Honour noted that the approach the court should take in a matter of this kind, where the referee has looked into the details of the figures and the particular aspect does not seem to be challenged as to its calculation, is that there is no need for the court to go into that calculation.

His Honour noted that the discussion of quantum meruit is, in a sense, beside the point since Abigroup did not seek relief on that basis. Rather it sought damages in the same amount. His Honour said that the quantum meruit analogy reinforced the appropriateness of the sum by way of damages or, more accurately, perhaps, as compensation in a sense which is undefined but which s.87 is sufficiently wide to accommodate.

Section 51AA

Abigroup based its claim not only on s.52 but also on s.51AA. The latter provision was of no assistance to Abigroup as the unconscionability referred to in s.51AA involves condemnation according to 'prerogative moral judgment'. His Honour also noted that the cases show that some relation entailing dependency and vulnerability is likely to be a feature of a situation within the section. No such element was at work between Abigroup and Peninsula.

The Court's Determination

The court made the following orders:

- (a) that the reports of the referee delivered to the court be adopted (varied by disallowing one of the variations); and
- (b) an order pursuant to s.78 of the Act 1974, that Peninsula pay compensation to Abigroup.

The amount of the compensation to which Abigroup was entitled was prima facie the quantum meruit sum referred to in the referee's report (\$2,874,817.00), plus interest in accordance the court rules.

CONCLUSION

The significance of this case is that it confirms:

1. A referee's ability to determine issues concerning misleading and deceptive conduct under the Act;
2. That a court will not generally depart from the findings of fact of a referee where there is evidence to support such findings and the court is satisfied that those issues have been carefully considered by the referee.

David Rodighiero's article first appeared in Carter Newell's *Constructive Notes* bulletin (September 2001) and is published here with permission.
