

Grande – misleading and deceptive conduct case

The Supreme Court of Western Australia recently found a director personally liable for misleading and deceptive conduct by reason of the director signing a Letter of Offer on behalf of the company, which contained certain representations. While the case dealt with provisions of the *Fair Trading Act 1987* (WA), both the *Fair Trading Act 1999* (Vic) and the Australian Consumer Law have equivalent provisions.

The plaintiff company (Grande) entered into an agreement with Southern Cross International Investments Ltd (Southern Cross) whereby it would purchase shares in Zen Resources Ltd (Zen) for \$2,250,000.00. The defendant, Tjandra Adi Pramoko (Tjandra), signed the part of the agreement known as the Letter of Offer on behalf of Southern Cross. Southern Cross was a business controlled by the Pramoko family and Tjandra was a director.

Clause 5 of the Letter of Offer provided that if, in two years' time, Zen was not taken over by an Australian Stock Exchange (ASX) listed company, or if Zen itself was not by that point listed on the ASX or any other major stock exchange, then Southern Cross would buy back the shares from Grande for the same price. It was also Grande's contention that there was an oral representation made at the signing of the agreement by Tjandra to Jun. The court did not accept the existence of an oral agreement.

The shares were purchased and after two years, Zen was neither listed on a major stock exchange or taken over by an ASX company. The shares were not bought back by Tjandra or Southern Cross.

Grande brought an action alleging that the defendant Tjandra had engaged in misleading and deceptive conduct when he signed the Letter of Offer containing clause 5, and when he made the oral representations to Jun. Though the case deals with older legislation, these provisions are mirrored in the current Australian Consumer Law (ACL).

Held – Justice Le Miere

By signing the Letter of Offer, Tjandra made two representations – that Southern Cross intended and had the capacity to perform the promise contained in clause 5, and that there were reasonable grounds for making that representation. The second of these is significant, as when a person makes a representation with respect to a future matter without reasonable grounds for doing so, that representation shall by default be taken to be misleading. The onus to prove otherwise rests with the person making the representation.

The plaintiff's case was that by signing the Letter of Offer, Tjandra himself had made the representation, even though he had signed the Letter on Southern Cross' behalf. The court found that though he had signed in his capacity as director, Tjandra did not escape personal liability. Under section 79 of the Act, a court can make an award of damages against any person knowingly concerned in contravention of the Act by a corporation. Therefore, Tjandra was potentially liable for the representations contained in clause 5 of the Letter of Offer.

The onus passed to Tjandra to prove that there were reasonable grounds for him making the representation. Tjandra submitted that his belief that Zen would be taken over by a company named Peak Resources, and the fact that Southern Cross was a business controlled by his family, were reasons enough to show that he had reasonable grounds to make the representation to Grande.

The court disagreed, and it was held that Tjandra could not prove the existence of reasonable grounds for making the representation. Tjandra hadn't made any attempt to cause Southern Cross to buy back the shares. Justice Le Miere noted that an unsecured advance of \$2.25 million made to a company to enable it to purchase shares in another unlisted company is *not [an] inherently likely scenario*. The absence of personal liability given by other members of the Pramoko family also indicated that the representation may not have been reasonable. Finally, the failure of Tjandra's father and brother to give evidence was telling. Justice Le Miere concluded that it was reasonable to draw an inference that their evidence on this point may have been disadvantageous to Tjandra's case.

Decision

Tjandra was found to have personally engaged in conduct which was misleading and deceptive under the Act, and orders for payment of \$2,250,000.00 and a transfer of the shares were made.

Take home message

Traditionally directors are protected by the corporate veil in carrying out their role. This case, however, highlights the risk to directors of being personally liable under fair trading and consumer protection laws if their conduct in relation to their company is misleading and deceptive. Caution needs to be taken by directors negotiating corporate transactions.

If you have further questions about this case, or would like more information please contact:

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