You’ve Entered Law Land

Essay/assignment example using IRAC method
Problem based question from contract law

Note: I haven’t included the fact scenario, but it’s not particularly necessary in this situation. In short, a person (Papier) asked for a quote from another person (Rock) to build a house or barn or similar after reading an advertisement created by Rock. There was also a short discussion of what Papier wanted to build. As expected, it didn’t turn out particularly well.

### QUESTION A

#### A Issue

Does Papier have a right to terminate the contract based on a breach of the term ‘registered building practitioner’?

#### B Law and application

Whether Papier can terminate the contract depends on the classification of the term ‘registered building practitioner’. It can be classified as a condition, an intermediate term, or a warranty. No information states whether the term was implied by statute or expressly agreed by the parties, therefore it will be classified as a matter of construction.

##### 1 Condition

The essentiality test created in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*, and approved of on appeal to the High Court and *Associated Newspapers Ltd v Bancks*, applies here. The test considers the nature of the contract as a whole including the intention of the contracting parties, and asks whether at the time of contract formation, the term was of ‘such importance’ that the aggrieved party would not have entered into the contract but for a ‘strict or a substantial performance of the promise’, and that this ought to have been apparent to the other party.

---

1. (1938) 38 SR (NSW) 632.
2. (1938) 61 CLR 286.
3. (1951) 83 CLR 322.
4. *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, 641.
In the current situation this term is likely to be considered as a condition. Papier specifically sought out a builder to avoid the ‘hassles’ of obtaining ‘special insurance’ and an ‘s137B report’. Without a registered builder these problems would not be avoided, therefore it is clear that ‘registered building practitioner’ was of ‘such importance’ to Papier that she would not have entered into the contract unless she was assured of its strict performance. Furthermore, this ought to have been apparent as Papier voiced her concerns regarding these issues.

Rock may argue that he did not hear Papier and so the importance of this term was not apparent to him, or alternatively that he was not aware of its importance despite hearing her. Furthermore, he may argue that while Papier will require ‘special insurance’ the principal benefit of the contract was the construction of a freestanding barn, and if she wishes, the property could be sold after 7 years without the need for an ‘s137B report’. While this argument is appears persuasive, it ignores Papier’s ultimate reason for entering into the contract which is the prompt sale of her property after the addition of a barn.

A condition allows the aggrieved party to terminate the contract ‘upon any breach of the promise, however slight’ and the right to seek damages.

In the event that this term is not held to be a condition, it would be prudent to consider whether it may be considered to be an intermediate term or a warranty.

2 Intermediate term

‘Registered building practitioner’ is unlikely to be classified as an intermediate term.

This can be determined using the test found in the English case of Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, subsequently recognised in Ankar Pty Ltd v National Westminster Finance (Aust) Ltd and approved by the High Court of Australia in Koomphahtoo Local Aboriginal Land Council v Sanpine. The test asks whether a breach will deprive a party of ‘substantially the whole benefit which it was the intention of the parties... that he should obtain’.

Comment [A5]: This and the following paragraph comprise the “analysis”.

Comment [A6]: This is an important consequence of a term being found a condition. I can’t remember if it was required for the essay, but sometimes these small additions can score you a few extra marks (or make up for sentences that start with “A a” - see my second comment above and note that I always submitted at the last minute)!!

1 Ibid, 642.
2 [1962] 2 QB 26 (‘Hongkong’).
3 (1987) 162 CLR 549 (‘Ankar’).
5 Ibid, [66].

You've Entered Law Land | http://youveenteredlawland.com
In *Bunge Corporation New York v Tradax Export SA (Panama)*\(^{10}\) it was made clear that an intermediate term must be able to be breached in a variety of ways. For example, the time clause in *Bunge* was not intermediate because it could only be breached, or not breached. This can be contrasted with the ‘seaworthiness’ term referred to in *Hongkong* which could be breached in a variety of ways, from the trivial to the fundamental.\(^{11}\)

It is clear that ‘registered building practitioner’ can not be breached in a number of ways; it will either be breached or it will not be breached. As such, ‘registered building practitioner’ is unlikely to be classified as an intermediate term.

3  Warranty

A warranty is a term that is subsidiary to the main contract, and a breach will only allow damages to be claimed.\(^{12}\) ‘Registered building practitioner’ is clearly not a subsidiary term and therefore not a warranty.

C  Tentative conclusion

The term ‘registered building practitioner’ was of such importance to Papier, which ought to have been apparent to Rock, that it is likely to be classified as a condition. This would provide Papier with the right to terminate the contract.

---

10 [1981] 1 WLR 711 (‘Bunge’).

11 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 71 (Diplock LJ).

II QUESTION B

A Issue

Has Rock contravened s 18 of the Competition and Consumer Act 2010 (Cth), Schedule 2 (“Australian Consumer Law”)?

B Law and analysis

Under s 18 a person ‘must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’.

Rock’s conduct through use of the advertisement and conduct when giving a quote to Papier need to be considered.

1 Did Rock’s advertisement contravene s 18?

(a) ‘In trade or commerce’ threshold and audience

The phrase “in trade or commerce” creates a threshold requirement to contravene s 18. Concrete Constructions (NWS) v Nelson13 discussed the meaning of this phrase and held that if the nature of dealings between two parties ‘bear a trading or commercial character’ then the threshold is passed.14 It is clear that the advertisement is of a commercial nature as this is how Rock deals with the public to generate business.

The identification of the audience is important to ensure the correct test is used to analyse the alleged conduct. The audience, to which the advertisement was directed, was the public at large.

(b) Was conduct likely to be misleading or deceptive?

To determine whether conduct is likely to be misleading or deceptive to the public at large, the characteristics of that class needs to be established. In Campomar Sociedad Limitada v Nike15

Comment [A8]: In the fact scenario, there was an advertisement and then a separate quote. Both needed to be analysed under section 18.

Section 18 has a few different things to consider. I think this part is structured well and helps the reader follow my argument (if I don’t say so myself!)

If you can use heading to help the reader then do it – if the reader (ie lecturer) finds your essay easy to follow then you will end up with higher marks.

Comment [A9]: Each (a), (b) and (c) sections here include a “rule” and “analysis” part.

Comment [A10]: This first paragraph in this (b) section is the “rule” for whether conduct was likely to be misleading or deceptive.

14 Ibid, 603.
International, a case also regarding advertising, it was held that the audience was made up of ordinary and reasonable people, with the qualification that they would ‘take reasonable care of [their] interests’ and that any ‘extreme or fanciful reactions’ would be excluded.

It could be argued that the advertisement was likely to mislead or deceive the public at large into giving the impression that he was a registered building practitioner.

Rock would argue that the ordinary and reasonable member of the public would not be misled or deceived by the advertisement and that he did not state that he was a registered builder for the simple fact that he was not one; the advertisement was used to provide examples of what he could build, areas in which he had previously built, and his contact details. Furthermore, given the brevity of the advertisement it could be expected that the public at large would take the time to analyse the contents closely.

On the other hand, it may be argued that a ‘highly experienced’ builder who has been working in the ‘Olinda area since 1990’ would be expected to be registered. However, Rock would say that this reaction should be regarded as ‘fanciful’ and that the public should have taken ‘reasonable care’ of their interests and used his contact details to inquire further.

In this situation Rock has a more persuasive argument and it does not appear that there is a ‘sufficient nexus between the conduct... and those misconceptions and deceptions’.  

2 Did Rock’s quote contravene s 18?

(a) ‘In trade or commerce’ threshold and audience

Providing a quote passes the threshold requirement as it is of a ‘commercial nature’ and was part of the dealings required to enter a contract for the construction of the barn.

The audience of the conduct in this situation was Papier, a specified individual.

15 (2000) 202 CLR 45 (‘Campomar’).
16 Ibid, [102]-[105].
17 See Pacific Dunlop Ltd v Hogan (1989) 23 FCR 553.
(b) Was conduct misleading or deceptive?

It was held in Butcher v Lachlan Elder Realty\(^{20}\) that when misleading or deceptive conduct is directed towards specific individuals, the nature of the parties and the nature of the transaction are to be assessed.

On the facts it could be inferred that Papier is intelligent as she works in a professional capacity as a forensic accountant and she was able to investigate the requirements of the construction and sale of her property to avoid ‘unintended and onerous consequences’ such as the special insurance and s137B report. The other party, Rock, is a ‘highly experienced’ builder who has worked from at least 1990 and can construct a variety of buildings. It could be inferred that his expertise means that he has knowledge of building requirements, such as special insurance and the s137B report.

While Rock may have regarded Papier as an intelligent person, she clearly did not understand that Rock was not a registered building practitioner. This term was important for the nature of the transaction, that is, building a barn, and Rock would have known this.

(i) Silence

In Henjo Investments Pty Ltd v Collins Marickville Pty Ltd\(^{21}\) it was held that silence could constitute misleading or deceptive conduct if the circumstances of the situation ‘give rise to an obligation to disclose relevant facts’.\(^{22}\) Demagogue Pty Ltd v Ramensky\(^{23}\) confirmed that silence could constitute such conduct, however moved away from a duty or obligation of disclosure in favour of a test where the ‘circumstances [of a situation] are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed’.\(^{24}\)

It is clear from the circumstances in this situation that Papier was under the mistaken belief that Rock was a registered building practitioner. Upon voicing her concerns she would have created a reasonable expectation that Rock would tell her of the relevant fact that he was not one.

---

\(^{21}\) (1988) 79 ALR 83.
\(^{22}\) Ibid, 95.
\(^{23}\) (1992) 110 ALR 608.
(ii) Reliance

If Rock had communicated to Papier that he was not a registered building practitioner then it is very unlikely that Papier would have accepted his quote. It is therefore clear that Papier relied on Rock’s silence as signalling that he was a registered building practitioner.

(iii) Intention

Rock could argue that his silence was not intentional however when ‘considered in the context of which it occurr(ed)’25 it is likely to be seen as misleading or deceptive regardless. The issue of intention is yet to be settled by Australian courts. 26

D Tentative conclusion

Rock’s advertisement is unlikely to contravene s 18. However, Papier’s concerns raised during the quote is likely to have created a reasonable expectation of disclosure of facts, and his silence in this situation is likely to constute misleading or deceptive conduct, in contravention of s 18.

26 Jeannie Paterson, Andrew Robertson and Arlen Duke, Principles of Contract Law (Thompson Reuters, 3rd Ed, 2009) [33.65].
III QUESTION C

A Issue

Has Rock contravened s 20 of the Australian Consumer Law?

B Law and analysis

Under s 20 a person ‘must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time’.

The threshold requirement of ‘in trade or commerce’ was discussed above and it is clear on the facts that Rock’s conduct does take place in trade or commerce.

‘Within the meaning of unwritten law’ refers to the meaning of unconscionable found in Australian common law. Commercial Bank of Australia v Amadio is a leading Australian case and defines unconscionable conduct as when a ‘party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability’.

Therefore, special disability and the knowledge of that special disability need to be shown. If so, a presumption of an unconscionable conduct is formed and the stronger party has a burden to show that the deal was ‘fair, just and reasonable’.

1 Special disability

Special disability does not refer to an ‘inequality of bargaining power’ or the result of a hard bargain seen from the perspective of the weaker party, but instead refers to a serious disabling condition. Examples are ‘poverty or need of any kind, sickness, age, sex, infirmity of body or mind,

27 (1983) 51 CLR 447 (‘Amadio’).
28 Ibid, 461 (Mason J).
29 Ibid, 474 (Deane J).
30 Australian Competition and Consumer Commission v CG Berbatis Holding Pty Ltd (2003) 214 CLR 51, 64 (Gleeson CJ).
drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is needed’.

It would be difficult to prove that Papier has a special disability. As noted, she appears to be an intelligent woman with the resources to investigate the requirements for the construction and sale of her property. On the facts she does not suffer from any of the special disabilities listed above. She may nevertheless argue that she had a limited understanding of the situation, similar to the respondents in Amadio, and that she required further information from Rock for a fair deal to be achieved.

Rock would argue that while she may have had limited understanding, the situation in Amadio was such that the respondents had a special disability due to a combination of factors, of which a limited understanding of the situation was only one. As such, Papier’s situation does not extend to one of ‘special disability’. This is a more persuasive argument and it is unlikely that Papier could show any other reason for a special disability.

2 Knowledge and rebutting the presumption

If a special disability was found, it would be necessary to show that Rock knew about this and took advantage of it. It would have been sufficient if a reasonable person thought a special disability was a possibility.

As no special disability would be shown, it is unnecessary to discuss knowledge in further detail, or the onus of rebutting the presumption of an unconscionable deal that is placed on the stronger party when both elements are shown.

C Tentative conclusion

It is unlikely that Rock has contravened s 20 as Papier is unlikely to prove any special disability, which is a necessary element for unconscionability.

33 Blomley v Ryan (1956) 99 CLR 362, 405 (Fullagar J).
IV  BIBLIOGRAPHY

A  Books


B  Cases

*Ankar Pty Ltd v National Westminster Finance (Aust) Ltd* (1987) 162 CLR 549
*Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322
*Australian Competition and Consumer Commission v CG Berbatis Holding Pty Ltd* (2003) 214 CLR 51
*Blomley v Ryan* (1956) 99 CLR 362
*Bunge Corporation New York v Tradax Export SA (Panama)* [1981] 1 WLR 711
*Butcher v Lachlan Elder Realty* (2004) 218 CLR 592
*Commercial Bank of Australia v Amadio* (1983) 51 CLR 447
*Campomar Sociedad Limitada v Nike International* (2000) 202 CLR 45
*Concrete Constructions (NWS) v Nelson* (1990) 169 CLR 594
*Demagogue Pty Ltd v Ramensky* (1992) 110 ALR 608
*Henjo Investments Pty Ltd v Collins Marickville Pty Ltd* (1988) 79 ALR 83
*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26
*Kimberly NZI Finance Limited v Toreo Pty Ltd* (1989) ATPR (Digest) 46-054, 53,195
*Koomphahtoo Local Aboriginal Land Council v Sanpine* (2007) 233 CLR 115
*Pacific Dunlop Ltd v Hogan* (1989) 23 FCR 553
*Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632
*Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 61 CLR 286

C  Legislation

*Competition and Consumer Act 2010* (Cth), Schedule 2 (“Australian Consumer Law”)