

Misinformation – Structure of Answer

Introduction

To prove breach of contract, we must prove that there was a breach of a **term, and that this term was a term of the main contract**.¹ Objectively we must look at the intention of the parties,² the time of the statement, importance of the statement, and the parties' knowledge/expertise.³ We must also consider whether the contract in dispute is a collateral contract.⁴ In this particular case _____ (fact of case, does it constitute a collateral contract?)_____.

(Collateral contract: Oral contract made by the main promisor ensuring something to the promise, which the consideration is that the promise will then enter into the main contract. This means that if this contract ensuring something is breached (incorrect statement etc) the main promise can sue the promisor for breach of the collateral contract.

This is the best way to get around the **Parole evidence rule**. Collateral contract may not be inconsistency with the "main" contract – *Shepperd v Ryde Corp*. Inconsistency not a problem for third party collateral contracts. *Hoyt's v Spencer*)

Is the statement part of the contract?

To show that this statement is part of the contract two issues must be considered; **the parole evidence rule** and whether **the statement was intended by the parties to be a term of the contract**.

The assessment of the term may be made using the **Oscar Chess v Williams** rule. This is that objectively, a reasonable person in the party's position would view it as a contractual term. It is reasonable to argue that in _____ position the assurance _____ would be considered a term of the contract. The intention of the incorporation of this term may be expanded in the test in

- a) *Time of statement;*
- b) *Importance of the statement; did it induce them entering the contract?*
- c) *Oral statement followed by written memorandum; and*
- d) *Parties knowledge or expertise*

Parole evidence rule limits the extrinsic evidence that may be brought to add to or vary the terms of the written contract. If the content is wholly written, then extrinsic evidence cannot be used. However extrinsic evidence may be used initially to examine whether the written contract is intended to be the whole of the contract (**Norwest Beef v P&O Steam Navigation**). _____ (Is it wholly written? Does Parole evidence rule apply?) – *Refer to cards for further information*

If a statement is on an important matter and or made before the contract was concluded it may be deemed as a warranty (*Van Den Esschert v Chappell*). _____ (Was the statement of importance?)_____ .

Wherever there is a pre-contractual misinformation, one option the aggrieved party can seek is to argue that the pre-contractual representation was actually a **term** of the contract (Main contract)

¹ *Oscar Chess Ltd v Williams* [1957] 1 WLR 370; *Ellul & Ellul v Oakes* (1972) 3 SASR 377.

² *Oscar Chess Ltd v Williams* [1957] 1 WLR 370.

³ *Ellul & Ellul v Oakes* (1972) 3 SASR 377.

⁴ *JJ Savage & Sons v Blakney* (1970) 119 CLR 435.

- If aggrieved party can successfully argue that then the advantage is, if it was a serious breach, or a breach of an **essential term** i.e. **a condition**
- They can elect to **terminate** the contract and claim **damages**

[.....]

[.....]

[.....]

[.....]

[.....]

[.....]

[.....]

[.....]

Example: Dan's intentions may also be questioned as he included a clause in the contract to the effect that no warranty is given as to the quality of the taxi cab or its fitness for any use whatsoever, which suggests that his statement was not negligent⁵ or innocent.

A negligent misrepresentation is information or advice made in breach of a duty of care. As between a plaintiff and defendant the duty of care may arise if;

- a) There is a special relationship existing between them
- b) If the defendant possessed or professed to have or exercise special care or skill.
 - a. The defendant knew or ought to have known that the plaintiff expected the defendant to exercise care; and
 - b. It was reasonable for the plaintiff to act upon the information or advice

An innocent misrepresentation is a representation that is is nor fraudulent or negligent.
Breach of Misrepresentation Act 1972 (SA)

Example: Our client would not need to show any fault, merely that the misrepresentation caused him to enter the contract.⁶ Then the burden shifts to defendant to show that he thought the statement was true and had reasonable grounds for that belief.⁷

Misleading and deceptive conduct

Section 18 of the ACL prohibits conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. If made in trade or commerce a misrepresentation is misleading conduct. The ACL includes other statutory prohibitions; liability for contravention of an ACL prohibition cannot be excluded or limited.

⁵ Shaddock v Parramatta City Council (1981) ALR 385.

⁶ Misrepresentation Act 1972 (SA) s 4.

⁷ Misrepresentation Act 1972 (SA) s 7.

Example of Answer: S 18 considers whether the statement was misleading.¹ Under the law, silence may not amount to misleading and deceptive conduct, and it is not a duty unless there is a duty of disclosure. Therefore, was there a duty of disclosure from Dan? If so, this would make it a positive statement and can argue that being in the industry, the fellow taxi driver should have known. If it is found that the statement is fraudulent under the Act, the clause cannot be enforced. Therefore as it is most likely to be misleading and deceptive under s 18, the exclusion clause is invalid under this act, and our client can get damages in compensation as per s 236.¹

Conclusion

Example Conclusion: There is a strong possibility of our client taking legal action against Dan. After much consideration into the causes of action, it is evident that there are several grounds applicable. I believe the most successful cause of action would be for misleading and deceptive conduct under s 18 of the Australian Consumer Law. Not only is it the most relevant to the facts but it has been very popular in contractual litigation in comparison to negligence or fraudulent misrepresentation. It has a broad application which means that it covers conduct during, as well as prior to, the formation of the contract (also inclusive of