

BURG DESIGN PTY LTD V WOLKI [1999] FCA 388

Federal Court of Australia – 9 April 1999

FACTS

Burg Design negotiated with Wolki to purchase a fast food chicken business in Albury. During the course of the negotiations Wolki made misrepresentations about the gross profit margin and the cash takings of the business. After the negotiations Burg

Design purchased the business and signed a contract which included the following acknowledgement clause:

“The Purchasers acknowledge that, in entering into this agreement, they have not relied upon any statement, representation, warranty or condition made or given by the Vendors or any one on their behalf in respect of the subject matter of this agreement, other than those that are expressly herein contained.”

Wolki defended a claim for misleading and deceptive conduct by Burg Design and claimed that the acknowledgement clause in the contract proved that Burg Design did not rely on the misrepresentations before purchasing the business.

ISSUES

Did the signing of the contract by Burg Design prove that it did not rely on the misrepresentations before purchasing the business?

FINDING

The acknowledgement clause did not prevent the claim for misleading and deceptive conduct as the contract was signed after the misrepresentations had been made and influenced Burg Design’s decision to purchase the business (and therefore sign the contract). The damage to Burg Design occurred when the misrepresentations were made and not when the contract with the acknowledge clause was signed.

A person making representations before the execution of the written contract cannot rely on an acknowledgement or similar clause to defend a claim of misleading and deceptive conduct.

The possible defence is to prove that the other party did not rely on the representation and that the representation was made when the contract was signed, and the other party clearly accepted the risk that statements outside the written contract could be incorrect.

QUOTE

Burchett J said

“If a party is thoroughly persuaded that a contract is favourable, the presence of a clause, particularly a printed clause which appears to be part of a legal form, suggesting there would be a defence to a claim which is not at all contemplated may not have a significant deterrent effect.”

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Just because the representation is believed, no claim arising out of it is expected. The position must often be as Shakespeare depicted it in The Merchant of Venice (Act 1, Scene III), where Antonio, believing Shylock's representation that the forfeit of a pound of flesh is "a merry sport", part of an accommodation offered in "much kindness", is prepared with alacrity to seal the openly dreadful bond."

IMPACT

A person making representations during contract negotiations should not assume that an acknowledgement clause will successfully prevent claims for misleading and deceptive conduct.

If there is a concern about representations made to the other party, then a specific clause denying responsibility for the actual representations could be included in the contract in an attempt to prevent a successful claim.

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