Carter Newell LAWYERS

Property and Real Estate Gazette

2nd edition

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Contents

From the Partner

We are delighted to publish the 2nd edition of the Property and Real Estate Gazette.

Our Property and Real Estate team, which I lead with Michael Gapes and Karen Brown, has compiled this latest edition of the Gazette to provide practical information on recent cases relevant to the property and real estate industry. The cases reviewed highlight the variety of issues that property owners, managers and visitors can face.

This latest edition includes, among many others, the decision of *Schultz v McCormack* [2015] NSWCA 330 relating to a claim where a visiting appellant suffered several injuries when she slipped and fell on a tiled verandah. We also look at the decision of *Bradshaw v Griffiths* [2016] QCA 20, where two statutory easements were granted over a rural property for the benefit and use of the adjoining landholder.

As a premier legal practice with teams in both Brisbane and Sydney, we are confident that this edition of the Property and Real Estate Gazette will be a useful resource for our readers.

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Case Note

Inglis & Ors v State of Queensland (No 2) [2015] QLAC 3

In this decision the Land Appeal Court of Queensland decision examines principles regarding valuation of compulsorily acquired land.

Facts

On 14 December 2007, the Queensland Government (**state**) compulsorily acquired two parcels of land owned by Robert, Marion and Paul Inglis (**Inglis**) at Gatton, Queensland, pursuant to the *Acquisition of Land Act 1967* (**Act**). The state acquired the land for the purposes of building a correctional facility.

Inglis and the state entered into compensation negotiations under the Act. However, Inglis and the state could not come to an agreement concerning the value of the land. The parties subsequently went to the Land Court to determine the amount of compensation payable to Inglis.

Land Court decision

Inglis and the state each retained a valuer to provide evidence concerning the value of the resumed land. Ultimately, the Land Court primarily relied on the evidence of Inglis' valuer. The Land Court held the land had a total value of $2,250,000 at the time of acquisition. Further, the Land Court made an award of $189,645 for the *'disturbance'* the acquisition of the land had upon Inglis (represented by their costs incurred), and interest on the compensation, including the award for the disturbance.

Appeal

Inglis and the state each appealed the decision of the Land Court to the Land Appeal Court of Queensland (**Land Appeal Court**).

Issues

The fundamental issues were:

- Whether the Land Court failed to take into account the interest of an adjoining property owner as potential purchasers when assessing the value of the land;

- Whether the evidence of the state's valuer ought to have been accepted;
- Whether the Land Court's amount awarded for *'disturbance costs'* was correct; and
- Whether the Land Court's decision to award interest on the compensation was exercised correctly.

Valuation of the land

Appellants – interest of an adjoining owner

Inglis submitted that the Land Court erred by failing to consider the interests of the Darwalla group of companies (**Darwalla**) as a potential purchaser. Inglis argued at the time of the resumption of the land, a neighbouring poultry business, operated by Darwalla, was interested in purchasing the land. Inglis contended that Darwalla's interest as a potential purchaser of the land increased its value above the rural site value, citing various factors to demonstrate Darwalla's interest, such as the fact that Darwalla was in a mode of expansion as a poultry business and the land offered various benefits due to its location for such a business to be immediately established.

The valuer who provided valuation evidence on behalf of Inglis had concluded that he considered the *'highest and best use of the land'* to be as a greenfield site broiler farm and that on that basis, the value of the land was the amount that Darwalla was prepared to pay, above market value, for its other likely use, being a *'mixed lifestyle/rural home site with some associated grazing and/or cultivation'*.[1] The valuer, in his report for the landowner, provided 12 specific reasons for that view.[2] These reasons largely related to Darwalla's particular circumstances, aspects of its business and prior conduct.

In making a determination as to the land value of the resumed land, which the valuer adopted to be $2.9 million, the valuer adopted 2 different valuation methods:

- A *'direct comparison'* approach which relied on sales of properties which the valuer considered to be comparable, taking into account his opinion that Darwalla was prepared to pay a premium above market value. In determining the premium, he examined five purchases made by Darwalla between 2004 and 2011, thereafter resolving that the value of the resumed land would have been for a value slightly more than $2.9 million[3]; and
- An approach based on the assumption that Darwalla would develop the resumed land for a chicken farm with a capacity of 1.44 million birds. For this approach, the valuer analysed five purchases of property by Darwalla which had indicated to him that an overall rate of $2 per bird could be adopted resulting in a valuation of the resumed land at $2.9 million.[4]

The valuer who gave valuation evidence on behalf of the state used a valuation approach which did not make any allowance for Darwalla's potential interest in the resumed land.

The Development Manager for Darwalla had given evidence that Darwalla had approached Inglis in relation to the potential purchase of the resumed land during the late 1990's, but would probably not have been interested in purchasing the resumed land in December 2007. This was however inconsistent with a statement recorded in the Appellant's valuer's report by which a director of Darwalla stated that if the resumed land *'had been put on the open market in 2007 (Darwalla) certainly would have expressed an interest'* in it.[5] Inglis sought to rely on this statement in the appeal (although Counsel for Inglis had previously explicitly asserted that they did not rely on the statement in the Land Court), and a number of other factors set out in a document provided on behalf of Inglis in the course of hearing the appeal including the following:

- Darwalla was an adjoining owner;
- Darwalla was in *'expansion mode'* and for a long time had practised land banking;
- The earlier approaches to Inglis by Darwalla;
- The proximity of the resumed land to Darwalla's processing facilities;
- That the size and physical features of the resumed land made it suitable for use as part of Darwalla's chicken producing operations; and
- Darwalla had paid a premium when purchasing other sites.[6]

The state, however, submitted that:

- The evidence was that the last occasion on which Darwalla had expressed an interest in purchasing the resumed land was in the late 1990's. The state

therefore argued that Darwalla's interest in the land had ceased by the date of the resumption due to factors such as the unavailability of water from underground water sources and the cost of connecting to the local authority's water supply system;

- There was no factual support (or at least insufficient support) for the assertion that Darwalla would definitely have purchased the resumed land for $2.9 million, if it had been available for purchase at the date of resumption; and
- The Land Court was correct to find that the resumed land should not be valued by reference to its potential for use for the expansion of Darwalla's operations.[7]

The court highlighted that there were a number of propositions, identified in various authorities considered,[8] which were relevant to the appellant's case including:

- In determining the market value of resumed land at the date of resumption, any potentiality of the land is to be taken into account (even where it is only of value to one purchaser, such as an adjoining owner);
- Offers to purchase the land by an adjoining owner can demonstrate that owner's interest, and that the land has a special value to that owner – the evidence of those offers is not, however, essential;
- In order to be relevant, factors which would lead to a conclusion that an adjoining owner would pay more than *'market value'* at the relevant date must be among the information available at least to the land owner; and
- In determining the significance of such interest, regard should be had to the possibility that the adjoining land owner might never require the land to take advantage of its special potentiality, or might not require it for that purposes, for a considerable time.[9]

The Land Appeal Court rejected Inglis submissions holding the evidence did not sufficiently demonstrate whether Darwalla's potential interest would have resulted in an increased value. The premium calculated by Inglis' valuer was based upon an assumption it would have been used for poultry farming in the short term. The Land Appeal Court reasoned that although Darwalla may have shown an interest in the land, there was insufficient evidence to show Darwalla would have expanded onto the land in the immediate short term for poultry farming. The court made reference to Darwalla's previous conduct of acquiring land for *'land banking purposes'* but concluded that the evidence had not shown that there was a real prospect that Darwalla would pay above market value for that purpose.

The Land Appeal Court therefore concluded the premium calculated by the appellant's valuer was not applicable to such a purchase.

State – Evidence of valuer

The state submitted the Land Court erred by dismissing the valuation assessments of the state's valuer. The state's valuer assessed the value of the land based upon the sale value of properties within the immediate vicinity of the resumed land, and indexed the value to the appropriate year. The approach was characterised by the Land Court as an error at the commencement of the valuation process which could not be relied upon.

The Land Appeal Court held the state failed to establish the Land Court was in error. The Land Appeal Court

noted there were good reasons for the Land Court to doubt the methods used by the state's valuer and reasoned there was no way to assess the reliability of the indexation used given the valuation report recorded considerable variability in market movement.

State – Disturbance costs

The state contended the Land Court erred in the award of disturbance costs to Inglis, with focus placed upon the reasonableness of the costs incurred (costs as compensation for legal and other professional assistance incurred in claims). The state submitted charges incurred by Inglis' solicitor and counsel were unreasonable, such as counsel settling *'every day correspondence'* and settling briefing instructions to experts. Inglis submitted the complexity of the trial warranted the disturbance costs awarded.

The Land Appeal Court held the Land Court considered the evidence regarding the costs incurred and concluded the costs claimed were necessarily and properly incurred. The Land Appeal Court highlighted the complexities of the claim and the fact that after the claim had been filed, the state raised issues which resulted in Inglis expending money to appropriately respond.

Interest

The Land Court had allowed interest on compensation, so far as it related to the value of the land, from the date of the resumption and also in respect of the disturbance award from the date of payment of the fees which resulted in the award. As an advance against compensation of $1,875,000 had been paid to Inglis on 1 June 2012, the Land Court framed the order so that interest was not payable on that amount from that date.

The state appealed against the order for interest.

The state sought to argue that the Land Court had erred in not holding that factors such as the delay between the date the property was resumed and the date the claim for compensation was filed by Inglis (which was filed in the Land Court on 26 November 2012), the refusal of Inglis to provide for a valuation for the purposes of negotiations constituted sufficient grounds for limiting the interest award to a period of one year from the date of the resumption.

The court noted that the power to award interest, under s 28 of the Act is discretionary and can only succeed if the party appealing the order establishes an error in the exercise of the discretion.

After considering the state's submissions, the court observed that there was considerable complexity to the claim, and that Inglis were not guilty of unreasonable delay because they engaged experts for the purpose of considering the claim, but did not ultimately rely on those experts. The court concluded that the evidence failed to establish that Inglis were guilty of unreasonable delay in the prosecution of the claim. On that basis, the court ultimately concluded that the state failed to demonstrate that the Land Court erred in relation to the award of interest.

Conclusion

Both appeals were dismissed.

This case illustrates the court's reasoning in assessing compensation in circumstances where a potential purchaser may have expressed an interest in purchasing the resumed land sometime prior to the date of the resumption, and the difficulties which could be associated in providing evidence of the value of the land in those circumstances.

It also highlights the court's reasoning in relation to making an award for disturbance costs and Interest under the Act, and the fact that conduct of the owner of resumed land during the course of negotiations in relation to the claim for compensation under the Act may be particularly relevant in the assessment of interest which may be payable to a land owner under the Act.

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[1] *Inglis & Ors v State of Queensland (No 2)* [2015] QLAC 3 [9].
[2] Ibid [10].
[3] Ibid [11].
[4] Ibid [12].
[5] Ibid [24].
[6] Ibid [29].
[7] Ibid [35].
[8] These authorities included: *Spencer v Commonwealth of Australia* (1907) 5 CLR 418, *Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302, *Phillipou v Housing Commission of Victoria* (1969) 18 LGRA 254, *Purden v Minister for Lands and Works (1966)* 19 The Valuer 729, *Kenny & Good Pty Ltd v MGiCA (1992) Ltd* (1999) 199 CLR 413, *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259
[9] *Inglis & Ors v State of Queensland (No 2)* [2015] QLAC 3 [42].

Case Note

Schultz v McCormack [2015] NSWCA 330

Duties owed by a property owner to entrants to a property examined by the New South Wales Court of Appeal.

Facts

A recent decision in the New South Wales Court of Appeal, *Schultz v McCormack* [2015] NSWCA 330, provides further commentary in relation to the duty of care owed by a property owner to ensure that entrants to a property are kept safe from hazards.

By analogy, the decision has relevance to the real estate industry in that it provides a further reminder that property managers must thoroughly inspect all properties which they are retained to manage for potential hazards and safety issues, and take positive steps to warn occupants and entrants to those properties of the risks.

Introduction

Ms Schultz, the appellant, was a visitor to a property owned by Mr and Mrs McCormack, the respondents. The appellant was injured when she slipped and fell on a tiled floor, which was, in essence, the top step of the verandah of the property.

The incident occurred at about midnight, with the step becoming wet due to rain earlier in the evening. The respondents had owned the property since 1980 and in around 2004 to 2005, had tiled the front verandah. The respondents maintained that since tiling the verandah at the property they had not noticed anything in relation to the slipperiness of the verandah when they entered or exited the property. The respondents also maintained that had been no other accidents on the tiles.

As a result of the incident, the appellant suffered a fracture of her right ankle and soft tissue injuries to her left shoulder, left hip and lower back. The appellant initially commenced proceedings in the NSW District Court.

The decision at trial

At trial, the appellant argued that the respondents ought to have warned her that the tiles on the verandah were unusually slippery when they became wet, in circumstances where the respondents knew, or ought to have known, that the tiles became wet when it was raining.

The respondents argued that the appellant was injured as a result of the materialisation of an obvious risk, and in the alternative, contributory negligence on the part of the appellant.

The appellant submitted expert evidence that identified a number of preventative measures that could have been taken to address the foreseeable risk of injury including, amongst other things, resurfacing the stairs with a more slip resistant material and extending the awning to ensure that the stairs did not become wet as a result of rain.

In relation to the extension of the awning, the trial judge held that this suggestion was an unreasonable and that there was no evidence that would reasonably suggest that extending the awning would prevent the stairs from becoming wet due to the presence of rain.

The trial judge also excluded the suggestion of resurfacing the stairs with a more slip resistant material in circumstances where there was no evidence that the respondents knew or ought to have known that the stairs required the application of an anti-slip coating or strips on the nosing of the treads prior to the incident.

Accordingly, the trial judge found that the respondents had not breached their duty of care as occupiers. The trial judge held that the appellant ought to have known that the stairs she was about to descend could have been wet and slippery due to the earlier rainfall, as such matters were obvious to a reasonable person in the position of the appellant.

The trial judge concluded that the respondents did not have a duty to warn the appellant of the risks associated with stepping onto the wet stairs, as such risks ought to have been obvious to the appellant.

The appeal

On appeal, the appellant argued that the trial judge:

- Had erred in characterising the risk of harm;
- Had erred in finding that the risk the appellant encountered was an *'obvious risk'*; and
- Should have found that the respondents were negligent.

'An occupier must take reasonable precaution to prevent harm to entrants including, if necessary, warning entrants of a potential safety hazard.'

The risk of harm

The trial judge identified the risk of harm as the '*risk of slipping on wet steps'* or the '*risk of slipping on wet tiles'*. The Court of Appeal stated that it was clear the trial judge was focused on whether there was an obvious risk of slipping on the wet steps and that, in the Court of Appeal's view, was a sufficient description of the risk of harm.

Obvious risk

The trial judge found that at the time of the incident, the appellant ought to have been able to see that the roof over the verandah '*did not have a significant overhang covering the steps'*, and accordingly, '*ought to have realised the roof might not have prevented rain falling onto, or being blown over, onto the steps'*. The Court of Appeal agreed with the appellant that it was unrealistic to attribute the above to either the appellant, or a reasonable person in her position.

The Court of Appeal added that the area where the appellant was standing immediately before the incident was dry and there was no evidence to suggest that the appellant was aware or ought to have been aware that the tiles had become wet due to rain reaching them.

The Court of Appeal concluded that the trial judge erred in finding that it would have been obvious to a reasonable person in the appellant's position that the wet state of the verandah posed a risk of slipping such that the respondents did not have a duty to warn the appellant of the associated risks.

The respondents' negligence

The trial judge rejected the opinion of the appellant's expert that the slip resistant values that were obtained when testing the tiles demonstrated that those tiles '*would generally be experienced as slippery when wet*'. The Court of Appeal considered that this was evidence from which a reasonable inference could be drawn that the respondents knew or ought to have known that the tiles were slippery when wet.

The respondents argued that the appellant's expert had provided no basis for their opinion that the respondents ought to have known that the tiles were slippery when wet and a home owner should not have to engage an expert to conduct tests on their property to determine the slip resistant qualities of certain surfaces. The respondents also submitted that the Court of Appeal could not make a finding of constructive knowledge given the evidence of the respondents of their experience of the tiles when wet.

The Court of Appeal held that the unchallenged expert evidence provided support for the proposition that the respondents, as occupants of a house with tiled surfaces that have been found to be slippery when wet, ought to have realised that this was the case given that the tiles had been in place for a period of five or six years before the incident.

Accordingly, the Court of Appeal held that the trial judge should have found that a reasonable person in the position of the respondents ought to have taken precautions against the risk of harm (the risk of slipping on wet steps or the risk of slipping on wet tiles), the most obvious of which was to warn the appellant that the tiles would have been '*abnormally slippery*' if the rain had blown onto them and they were wet. The Court of Appeal added that the respondents could have also placed mats on the verandah to provide a non-slip surface.

The Court of Appeal concluded that the respondents had failed to take these precautions and ought to have been found to have breached their duty of care to the appellant. The Court of Appeal allowed the appeal and ordered judgment for the appellant in the sum of $750,000, with the costs of the appeal and trial to be paid by the respondents.

Conclusion

The decision demonstrates that an occupier will not be excused from liability for injury arising from a hazard, where the occupier ought to have known of the existence of the hazard. In the present case, it was considered that the respondents should have known that the tiles were slippery as a result of their occupation of the property for a period of five or six years after the tiles had been laid.

Whilst this case does not relate to a rental property, it serves as a timely reminder for all landlords and property managers to ensure that rental properties are regularly and thoroughly inspected for potential hazards and safety issues and positive steps are taken to warn occupants and entrants to the property of those issues.

Further, best practice dictates that landlords and property managers take steps to prevent access to areas which may pose a danger to entrants to a property. Simple measures such as cordoning off an affected area with hazard or barrier tape and the placement of warning signs, should be adopted in such circumstances. Photographs of such measures should also be taken and placed on file. If a landlord or property manager is in any doubt as to whether an identified issue constitutes a safety hazard, they should err on the side of caution and seek expert advice from a licensed tradesperson.

In addition, in respect to rental properties in which a safety hazard has been identified, written notice of the hazard should be provided to the tenants (and any contractors scheduled to visit the property) and placed on the property management file.

Case Note

Wright v KB Nut Holdings Pty Ltd [2013] QCA 66

The Queensland Court of Appeal has awarded a plaintiff damages after she sustained an injury while cleaning a property.

The Court of Appeal judgment of *Wright v KB Nut Holdings Pty Ltd* [2013] QCA 66 highlights the value of conducting regular property inspections and the importance of engaging competent contractors who are able to perform their work to an appropriate standard.

Background facts

In April 2009, the appellant, Robyn Wright, came to Brisbane for a week long family holiday and stayed at a serviced apartment complex. The complex was operated by an onsite management company, who was the respondent in this matter. Mrs Wright, who resides interstate, had booked the apartment over the internet.

Mrs Wright and her family were dissatisfied with the state of cleanliness and repair of the apartment upon their arrival. In particular, Mrs Wright maintained that there were significant levels of dust, fluff and mould, and that there was rubbish lying around the apartment.

After the first day, Mrs Wright complained to the onsite managers about the condition of the apartment and asked for it to be properly cleaned.

After returning from a day out, she noticed that an attempt had been made to clean the apartment in her absence. However, Mrs Wright was still not satisfied with the cleanliness of the apartment and made a further complaint to the onsite managers. In response, she was advised that the cleaning contractors were going to be replaced due to their poor work performance. The onsite managers did not, however, offer to arrange for a further clean to be carried out or organise alternative accommodation for Mrs Wright and her family.

Mrs Wright advised the onsite managers that she was not prepared to have her children stay in the apartment in its current condition and volunteered to undertake the cleaning of the apartment herself. She purchased some disinfectant, rubber gloves and cleaning cloths. The onsite managers provided her with a mop and

broom. Mrs Wright asked to borrow a vacuum cleaner but was told by the onsite managers that they did not own one.

Mrs Wright proceeded to conduct a thorough clean of the apartment. When she was polishing the wooden stairs, her finger was pierced by a needle situated on the rear of a step. The needle had been obscured by dust. The stairs were also sticky, perhaps from a spilt liquid. The needle penetrated her cleaning glove and became lodged in her finger.

Mrs Wright had some blood tests whilst in Brisbane which indicted that she was negative for Hepatitis B, but borderline for HIV. When she returned to Adelaide, she had three further blood tests, all of which were indeterminate, although a specialist advised her that he was confident that she had not contracted HIV.

Notwithstanding this, Mrs Wright suffered from depression, abused alcohol and became suicidal. She was hospitalised in 2011 as a result of her symptoms.

Mrs Wright sued the onsite managers, seeking damages of $648,010.82 for breach of contract, negligence and for breach of a contractual term implied pursuant to s 74(1) of the *Trade Practices Act 1974* (Cth) (which was in force at the relevant time).

At first instance, the trial judge rejected Mrs Wright's claim, finding in favour of the onsite managers. Mrs Wright was ordered to pay the onsite manager's costs.

Interestingly, the trial judge fully adopted the evidence of Mrs Wright and her family. Importantly, Mrs Wright produced a DVD recording which documented the filthy state of the apartment. The onsite managers adduced evidence of their standard cleaning procedures, which included a thorough vacuuming and mopping of the stairs.

In spite of the more cogent evidence adduced by Mrs Wright, the trial judge rejected the claim on the basis that it was not reasonably foreseeable for the needle to be discovered during a routine apartment service. The trial judge took the view that the needle must have been lodged in a crevice in the step and was not plainly visible.

The Court of Appeal's decision

The Court of Appeal quickly dispensed with the trial judge's findings. In the majority decision published by Muir JA, he opined that the trial judge did not place sufficient weight on the evidence adduced by Mrs Wright concerning the build up of dust and debris on the stairs.

Muir JA said that in his opinion, an obvious explanation for Mrs Wright's failure to see the needle was that it may have been covered, or partially obscured, by the material on the stairs. He went on to note that there was no sufficient reason to conclude that the needle, if it had been dislodged by Mrs Wright's cleaning activities, would not have been likely to have been dislodged or detected by a cleaner using normal skill, diligence and equipment.

The Court of Appeal then said that having regard to the trial judge's other findings and the objective evidence, it accepted Mrs Wright and her husband as credible witnesses and adopted the trial judge's reservations about the evidence provided by the onsite managers.

The court also noted that a reasonable person, in the position of the onsite managers, would have taken the precaution of properly cleaning the apartment. It commented that there was a foreseeable risk of injury to Mrs Wright of which the onsite managers knew or ought to have known. It stated that the build up of filth in the apartment increased the risk that objects such as shards of glass, safety pins and needles would lie unobserved until stood on or touched by an occupier.

Muir JA said that it was anticipated that an occupier would be likely to walk around the apartment in bare feet and that some cleaning of the stairs could be by hand. He said that the general condition of the apartment also gave rise to wider health issues and that it was foreseeable that a person injured physically might, in consequence, suffer psychiatric impairment.

The Court of Appeal unanimously allowed Mrs Wright's appeal and awarded her damages in the sum of $494,750 plus interest.

Important lessons from this decision

The onsite managers could have avoided the unfortunate circumstances of this case by engaging more competent cleaning contractors. They also failed to inspect the cleanliness of the apartment to satisfy themselves that it had been carried out to an appropriate standard and that the apartment was safe for occupation.

Further, the onsite managers should not have agreed to allow Mrs Wright to undertake the cleaning of the apartment herself and should have instead immediately engaged reputable cleaners to remedy the poor condition of the apartment or offered her alternative accommodation.

While the facts of this case involved the cleaning of a short term rental apartment, the decision is of course relevant to all landlords and residential property managers. Property managers are obliged to carry out thorough regular inspections of all properties under their management and to only engage competent contractors in accordance with the terms of their property management agreement with their landlord clients.

Conclusion

As this case demonstrates, it is critical that landlords and property managers communicate properly with tenants and respond appropriately to their concerns. In spite of the substandard performance by the cleaning contractor, Mrs Wright's injury (and the judgment against the onsite managers of almost $500,000) could have been avoided had the onsite managers responded appropriately to the complaints made by Mrs Wright, and arranged for the apartment to be properly cleaned or rehoused her in alternative accommodation.

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Heidi is a Senior Associate in Carter Newell's Financial Lines group and has many years experience in advising on and defending claims against professionals.

Heidi specialises in insurance-related matters, including professional indemnity claims, ranging from general property and injury liability claims to defamation, fidelity and medical malpractice. She advises in regards to all aspects of claims including policy interpretation and indemnity, liability and quantum.

Heidi has acted for real estate agents in defending claims involving allegations of misleading and deceptive conduct, breaches of the Property Occupations Act 2014 (Qld) (formerly Property and Motor Dealers Act 2000 (Qld)) and the mismanagement of properties.

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Case Note

Johnson & Anor v Hancock [2014] QCA 130

The Queensland Court of Appeal affirms an occupier's positive duty to warn entrants of potential hazards.

The Queensland Court of Appeal's decision of *Johnson & Anor v Hancock* [2014] QCA 130 provides useful guidance as to the extent of an occupier's obligation to inspect a property and ensure that entrants to a property are kept safe from hazards.

By analogy, the decision has relevance to the real estate industry in that it confirms that property managers and sales agents must thoroughly inspect all properties which they are retained to manage or sell for potential hazards and safety issues, and take positive steps to warn occupants and entrants to those properties of the risks.

The facts

In October 2009, a garden maintenance contractor, Cawood Hancock, and his assistant were performing some gardening work in the yard of a property owned by a Mr and Mrs Johnson in Brisbane's western suburbs.

Whilst attempting to prune some shrubs with a chainsaw in an area behind the swimming pool at the property, Mr Hancock stepped backwards onto a metal lid over a cylindrical drainage pipe which was 900mm in diameter. The metal lid collapsed under Mr Hancock's weight, causing him to fall into the pipe which was 2 meters deep. Mr Hancock injured his right knee. Unfortunately, complications arose as a result of the injury and Mr Hancock died a few weeks after the incident.

Mr Hancock's widow brought proceedings against the Johnsons for loss of dependency and on the behalf of her late husband's estate.

The metal lid on the drainage pipe may have been obscured by leaf litter and other vegetative debris on the day of the incident. The pipe was not displayed on any drainage plan, although a title search of the property revealed the existence of a drainage easement.

The trial judge in the Queensland District Court considered that the drainage pipe had likely been

installed in the 1960's, when a drainage easement was created. As it transpired, before Mr Hancock's death, he attended the office of his solicitors and provided a detailed description of the incident.

File notes of this attendance indicated that Mr Hancock had been called to the property to plant new palm trees in an area adjacent to the swimming pool, where the drain pipe was located.

The decision at trial

At trial, the evidence of the former owners of the property (who sold it to the Johnsons in 2007), the former tenants, and other contractors who had visited the property was considered in an effort to determine whether any such person, or indeed the Johnsons themselves, were aware of the existence of the drainage pipe. Ultimately, it could not be definitely concluded that the Johnsons were aware of the drainage pipe on the basis of the oral evidence.

As it transpired, two small pieces of PVC piping, in addition to black plastic sheeting and sprinklers appeared in the area adjacent to the metal lid of the drainage pipe. The Johnsons denied that they had placed, or caused to be placed, these items in that area. The former owners also denied placing these items, and further provided evidence that the items were not present on the day of settlement of the sale of the property to the Johnsons.

In this regard, the former owners also provided evidence that the metal lid of the drainage pipe was not obscured, and was clearly visible on the day of settlement. The former owners confirmed that they were aware of the drainage pipe.

The trial judge inferred on the basis of oral testimony, and various photographs taken at different junctures throughout the life of the property, that the items must have been placed by the Johnsons after they had acquired the property. In making this finding, it was crucial that the trial judge doubted the credibility of the Johnsons, and found them to be unreliable witnesses.

The trial judge also found that the Johnsons ought to have been aware of the drainage pipe, as reasonably careful owners of a suburban residential property. In this regard, it was relevant that when the Johnsons entered into a contract to purchase the property, they were provided with a title search of the property, which naturally revealed the existence of the drainage easement.

'Anyone who exercises control over a property must identify any risks and notify entrants of those risks.'

The trial judge considered Mr Hancock would have understandably been focused on operating the chainsaw at the time of the incident and accordingly, he would not have easily detected the metal lid of the drainage pipe. The trial judge found that an individual, who was specifically inspecting the area, would certainly have discovered the metal lid.

Ultimately, the trial judge found that the Johnsons ought to have warned Mr Hancock of the existence of the drainage pipe, and that their failure to do so was negligent, and resulted in his death. He awarded Mr Hancock's widow the sum of $445,515.90 plus costs.

The appeal

The Johnsons appealed the trial judge's findings, arguing that the evidence was not sufficient to establish that the Johnsons were aware of the existence of the drainage pipe. The Court of Appeal rejected that argument and found that it was reasonable to infer, having accepted the evidence of the previous owners, that the PVC pipes were not present on the date of settlement and that they must have been placed there by the Johnsons.

The Johnsons argued that it was not reasonable to infer that the PVC pipes had been placed there prior to the incident, and that they may in fact have been placed there after the incident. The Court of Appeal considered that there was no logical reason for the Johnsons to have placed the pipes in this interim period, and that it was therefore appropriate to conclude that they had been placed there prior to the incident. The Court of Appeal went on to state that this amply supported the inference that notwithstanding their denials, the Johnsons had been in the area in which the drainage pipe was located at a time prior to Mr Hancock's fall.

The Court of Appeal also accepted that it was appropriate for the trial judge to conclude that the metal lid of drainage pipe was clear of debris on the date of settlement and that the Johnsons ought to have been aware of the existence of the drainage pipe. The Court of Appeal stated that it was open to the trial judge to conclude that once the Johnsons knew of the presence of the drainage pipe they would, as reasonable people, have inspected it within a reasonable time of their occupancy of the property.

Accordingly, the appeal was dismissed and the judgment against the Johnsons in the sum of $445,515.90 plus costs was upheld.

Conclusion

The decision demonstrates that an occupier will not be excused from liability for injury arising from a concealed hazard, where the occupier ought to have known of the existence of the hazard. In the present case, it was considered that at the very least, the Johnsons should have performed an inspection of the yard, having been made aware of the existence of the drainage easement on the title search.

This decision also demonstrates that anyone who exercises control over a property (whether it be an owner of a property, a property manager managing a property or a sales agent conducting inspections of a property for sale), must thoroughly inspect the property for potential hazards and safety issues and take positive steps to warn occupants and entrants to the property of those risks.

Further, best practice dictates that property managers and sales agents take steps to prevent access to areas which may pose a danger to entrants to a property. Simple measures such as cordoning off an affected area with hazard or barrier tape and the placement of warning signs, should be adopted in such circumstances. Photographs of such measures should also be taken and placed on file. If a property manager or sales agent is in any doubt as to whether an identified issue constitutes a safety hazard, they should err on the side of caution and seek expert advice from a licensed tradesperson.

In addition, in respect to tenanted properties in which a safety issue has been identified, written notice of the hazard should be provided to the tenants (and any contractors scheduled to visit the property) and retained on file.

Case Note

Schultz v Bank of Queensland Ltd [2015] QCA 208

This Queensland Court of Appeal decision serves as a timely reminder to financial institutions to ensure any advice provided regarding a guarantee is accurate and borrowers are well informed of the potential consequences.

The facts

Kym Schultz (**Ms Schultz**) was born in 1959 and educated to Year 12. She married her former husband in 1999. At the time, she was working as a sales representative for a major corporation and retained ownership, in her own name, of properties situated at Highgate Hill and Cotton Tree. Her husband had multiple businesses and owned a property at Mudjimba Beach, which he had inherited as vacant land. She funded the building of the family home on that property. In early 2000, she and her husband were registered as co-owners of the property at Mudjimba Beach.

Ms Schultz and her former husband decided to establish a family trust. The class of primary beneficiaries comprised themselves. The class of secondary beneficiaries included their children. Camelon Pty Ltd (**Camelon**) was established in 2005 as trustee for that family trust. Ms Schultz and her former husband were the directors and shareholders of Camelon.

Subsequently, Ms Schultz sold her unit in Highgate Hill and loaned the sale proceeds to Camelon. It invested those funds in a portfolio of securities. The Mudjimba Beach property was then transferred to her name only in order to protect the property from the separate creditors of her husband.

On 11 April 2007, Ms Schultz executed a guarantee in respect of an advance made by the Bank of Queensland (**BOQ**) to Camelon as trustee for the family trust to enable Camelon to acquire a parcel of land adjacent to the appellant's residence at Mudjimba Beach, which Ms Schultz and her family used as part of the surrounding grounds to their residence to directly access the beach via a public walkway (**Guarantee**). The amount guaranteed was $773,000. The Guarantee was secured by mortgages over Ms Schultz's Mudjimba Beach and Cotton Tree properties.

Ms Schultz did not receive independent legal advice in relation to the Guarantee, and instead signed a waiver

of the opportunity to seek and obtain that advice. The waiver confirmed she had been told to seek independent legal and financial advice, but decided not to do so before entering into the Guarantee. The waiver also acknowledged she understood the practical legal effect of the documentation and transaction. In particular, it confirmed she understood that if the borrower defaulted, Bank of Queensland (**BOQ**) would be entitled to sue her, as guarantor, to recover the monies due to them.

The Guarantee was not the first guarantee entered into by Ms Schultz. In early 2006, Ms Schultz entered into a guarantee in respect of a loan of $400,000.00 to her then husband for his business and sought and obtained legal advice prior to entering into that guarantee. In addition, on 17 July 2006, Ms Schultz entered into a second guarantee for $444,000.00, in respect of a loan to Camelon for investment purposes, but did not receive independent legal advice in relation to that guarantee, instead opting to sign a waiver of the opportunity to seek and obtain that advice.

Ms Schultz claimed relief from her legal obligation to pay the BOQ under the Guarantee on the basis of the equity in *Yerkey v Jones*[1], which ensures a banking institution provides full information to protect a vulnerable person from pressure arising from the nature of a spousal relationship. The equity is not dependent on the bank having notice of unconscionable dealing between spouses.

Alternatively, she claimed relief on the basis of alleged unconscionable conduct by BOQ, either pursuant to equity or a contravention of s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth), which prohibits persons in trade or commerce from engaging in unconscionable conduct in relation to financial services.

Ms Schultz claimed that she did not understand the nature and effect of the transaction she entered into with the BOQ and entered into the relevant guarantee as a *'volunteer'* who obtained no financial benefit from the transaction. She asserted that as BOQ was aware she was a wife providing a surety for a loan to a company controlled by her husband, BOQ had an obligation to explain the nature and effect of the Guarantee to her, but did not do so in accordance with its obligations.

Ms Schultz contended that the waiver she signed in respect of the relevant guarantee did not truly state her position as she did not understand the transaction. BOQ's representative, explained that the *'worst case scenario'* was that if Camelon defaulted, BOQ would sell the secured property to recoup the sum and she would have to repay the loan. She therefore claimed that she did not understand she could be made bankrupt in the event she could or would not repay the loan or that the mortgage over the Cotton Tree unit was not limited to $150,000.

Ms Schultz also asserted that she was at a *'special disadvantage'* given BOQ did not inform her that Camelon was in default of the terms of the $444,000 loan previously provided to it by failing to provide financial documentation within 180 days as required by the terms of the facility.

Her claim was dismissed by the trial judge and she appealed against that dismissal.

Issues

The court was required to consider whether the trial judge erred in:

- Finding that she was not under any material misunderstanding as to the nature and effect of the transaction; [2]
- Failing to make an express finding as to whether Ms Schultz was a volunteer for the purposes of the principle in *Yerkey*;
- Failing to make an express finding as to the onus of proof; and
- Finding that the BOQ provided adequate explanations of the nature and effect of the transaction and that she was not under any special disadvantage.

Decision

The Appeal was dismissed for the following reasons:

Material misunderstanding

The trial judge gave adequate reasons for the finding that there was no material misunderstanding and there was no need for the trial judge to traverse every aspect of the evidence.

For the purposes of the *Yerkey* equity, if Ms Schultz misunderstood the nature and effect of the transaction she did not have to pay the outstanding amount due under the loan.

The trial judge expressly found that Ms Schultz:

- Knew the Guarantee was for a loan of $773,000;
- Gave no evidence that she did not understand she would be liable for interest and costs as well as the amount of the loan under the Guarantee; and
- Knew the *'worst case scenario'* was that the secured property might have to be sold.

Although BOQ did not expressly advise Ms Schultz that in the event of a shortfall from the sale of those properties she could be made personally bankrupt as part of the process of recovering the remaining outstanding amount for which she was liable, there was no obligation on BOQ to do so. It added nothing to Ms Schultz's understanding of the nature and effect of the transaction, which was that she was liable to repay the entire sum in the event of default. Similarly, BOQ had no obligation to tell Ms Schultz that the mortgage over the Cotton Tree unit was not limited to $150,000.00 as Ms Schultz knew her liability to repay was for the total sum, and that both mortgaged properties could be sold.

Volunteer

The trial judge expressed concern as to whether the transaction (which involved the purchase by the trustee of a family trust of land adjacent to the family home which was to be used by Ms Schultz and her family personally, in circumstances where Ms Schultz was a major creditor of that trustee company), excluded the appellant from qualifying as *'a volunteer'* for the purposes of the *Yerkey* equity, but ultimately assumed the appellant was a volunteer.

The court found that in the circumstances, the trial judge's failure to make an express finding on the question of volunteer, did not affect the correctness of the trial judge's ultimate conclusions. This is because the assumption the trial judge had made was favourable to Ms Schultz and consistent with a conclusion that the benefit to Ms Schultz from the transaction was not of such a *'direct and immediate nature*' as to preclude Ms Schultz from being a volunteer within the meaning of the equity.

Onus of Proof

BOQ had an onus to establish that it took steps to adequately explain the nature and effect of the Guarantee to Ms Schultz. The trial judge expressly determined the question of the adequacy of BOQ's explanation of the transaction on the basis they carried the onus on that issue and found the BOQ's representative had adequately explained the transaction to her.

The evidence, accepted by the trial judge, supported that conclusion. [3]

Ms Schultz also acknowledged BOQ had informed her that the Guarantee related to a total sum of $773,000, that the Mudjimba Beach property and the Cotton Tree unit were on the line, and that, in the event of default, she was liable to repay the outstanding loan.

The court therefore found that the trial judge failure to make an express finding as to where the onus of proof lay did not affect the correctness of their ultimate conclusion.[4]

Unconscionability

Relief was dependent upon Ms Schultz establishing that she was under a special disadvantage which adversely affected her ability to make a judgment as to her own best interests. In order to obtain relief:

- The special disadvantage needed to be sufficiently evident to BOQ; and
- BOQ also had to take unfair advantage of it in entering into the transaction - equity requiring proof of a *'predatory state of mind'* by BOQ.

The trial judge's had found that the breach of the facility was *'a technical point'* which had to be viewed in the context of the remaining findings. Those findings included that: [5]

- The first meeting for the $773,000 loan occurred before there had been any such breach;
- Ms Schultz, at trial, had abandoned her pleaded case that BOQ had failed to inform her of material financial information; and
- There was no suggestion her husband did not provide the up-to-date financial information to BOQ to enable a proper assessment of whether it ought to grant the facility of $773,000.

Each of those findings supported the trial judge's conclusion that BOQ's failure to inform Ms Schultz of the non-provision of the financial information within the 188 day period did not place her in a position of special disadvantage.

Conclusion

In this case, the Guarantee was provided as security for a loan to the borrower to facilitate the purchase of property. It therefore provides an important illustration of the information required to be provided by lending institutions to potential guarantors in similar transactions.

This decision emphasises the requirement for financial institutions to ensure that any advice provided regarding the nature and effect of guarantees is accurate and gives the borrower a clear understanding of a *'worst case scenario'*, where a guarantor opts not to receive financial and/or legal advice regarding a guarantee.

In this case, the court found that:

- Those obligations did not extend to a requirement to advise on *every* possible worst case scenario (e.g. that the guarantor could be made personally bankrupt as part of the process of recovering the remaining outstanding amount for which she was liable, or in relation to any limits on the amounts recoverable under the terms of a mortgage); and
- Informing the guarantor of the total sum that related to the Guarantee, that her properties were *'on the line'*, and that in the event of default she was liable to repay the loan was an adequate and explanation of the nature and effect of the Guarantee was sufficient.

Financial institutions should therefore exercise caution when providing advice in relation to Guarantees, and consider a requirement for the guarantor to obtain independent legal and/or financial advice in relation to proposed guarantees, as appropriate.

[1] (1939) 63 CLR 649.
[2] *Schultz v Bank of Queensland Ltd* [2015] QCA 208 [45].
[3] Ibid [50].
[4] Ibid [48].
[5] Ibid [53].

Case Note

Bradshaw v Griffiths [2016] QCA 20

The Queensland Court of Appeal has partially granted an appeal in respect of the Supreme Court's decision to grant two statutory easements over a rural property for the benefit and use of the adjoining landholder.

Facts

Peter Griffiths once owned a large cattle property (**Stuart Downs**). In 1972, Mr Griffiths subdivided Stuart Downs, creating a new property (**Laurel Downs**). Mr Griffiths sold Laurel Downs but retained ownership of Stuart Downs.

Stuart Downs was not landlocked, and had a road frontage to a road, Red Range Road, at the far eastern end of the property. The homestead on Stuart Downs, however, was located at the western end.

Before the subdivision occurred, a gravel road (**Road A**) led from Mr Griffith's homestead and the cattle yards on Stuart Downs through a part of the property which later became Laurel Downs, to the nearest public road. Road A was used for a number of purposes, including to transport cattle and for other personal uses such as collecting mail.

In 1989, Jan Bradshaw became the owner of Laurel Downs. Mr Griffiths continued to use Road A by informal agreement.

In 1991, Mr Griffiths built additional cattle yards in a more central location on Stuart Downs. In addition, by informal agreement, the Bradshaws permitted Mr Griffiths to construct a new gravel Road (**Road D**), traversing part of Laurel Downs to reach the public road. That road was used to transport almost all the stock leaving Stuart Downs, mainly by B–Double trucks.

For the next 22 years, the Bradshaws permitted Mr Griffiths to transport cattle out of Stuart Downs using Road D, which occurred on approximately 5 occasions each year. Subsequently, the relationship between Mr Griffiths and the Bradshaws deteriorated and from 15 February 2013, Mrs Bradshaw denied permission to cross Laurel Downs by both roads.

Thereafter, Mr Griffiths commenced proceedings

under s 180 of the *Property Law Act 1974* (Qld) (**PLA**) seeking statutory easements over Roads A and D. Mr Griffiths was successful at first instance[1] and Mrs Bradshaw appealed against those orders.

Issues

In order to obtain relief under s 180 of the PLA, it must be shown, among other things, that it is *'reasonably necessary in the interests of the effective use in any reasonable manner of the dominant land'* that the land, or the owner of that land should have a *'statutory right of user in respect of that other land'*. This is a high standard and there is a general reluctance to interfere with the propriety rights of an owner of land. Notably, the test requires the statutory right of user to be *reasonably* necessary, rather than *absolutely* necessary.

One key issue that the court has to consider is the degree of the burden that would be imposed on the servient land by the grant of the easement, relative to the practical benefits that would be obtained by the owner of the dominant land. The more onerous the imposition, the greater the onus will be for the applicant to demonstrate reasonable necessity.

Trial Judge's findings

It was accepted at first instance that if no easement was granted, Mr Griffiths would need to construct a new road on Stuart Downs from the cattle yards to the public road. Evidence was given at trial to the effect that the new road would be significantly disadvantageous due to a number of factors:

- The road would need to cross a creek on Stuart Downs which, aside from increasing the costs of construction, would also likely result in periods where the road could not be used due to the occasional flooding of the creek;
- In order for the Griffiths family to reach nearby towns or even to the mail box at the end of Road A, they would have to travel up to an additional 40km;
- The proposed road would be built over *'foxbush'* country, namely an area of land where there is an increased propensity for vehicles to become bogged due to the moistness of the soil underneath the surface, which dries out slower than the black soil underneath Roads A and D; and
- The costs of constructing the new road would be between $60,000 and maybe over $100,000.

The trial judge observed that while access to Road A or Road D was not absolutely necessary for the effective use of Stuart Downs, the reasonable necessity standard had been satisfied. The trial judge found that the impact upon Mrs Bradshaw would be minimal, as primarily demonstrated by the longstanding consent and the use of Roads A and D by Mr Griffiths for many years prior to the proceedings. The evidence did not establish that Mrs Bradshaw had been significantly impacted by the historical use of those roads. Moreover, it was found that any impact on the value of the land could be compensated.

On the basis of these findings, the trial judge ordered

that easements be granted over both Road A and Road D. The evidence demonstrated that if access were granted only to Road A, then there would need to be a widening of that road at some points to better accommodate the passage of large cattle haulage trucks. Conversely, if access was only granted to Road D, then there would be difficulties for the Griffiths in traveling from the homestead and the original cattle yards on Stuart Downs. Therefore, on the basis of the acceptance that the use of these roads had minimal impact upon Mrs Bradshaw, the trial judge granted easements over both roads.

Were both easements necessary?

Critically, in deciding that both easements should be granted, the trial judge had considered that if Road A, but not Road D could be used, Mr Griffiths would have to widen at least the road between the homestead and the new yard in order to accommodate B-Double trucks and that the road would still be an inferior road for transporting cattle from the new yard.

Mrs Bradshaw appealed on a number of bases, including that the trial judge had erred in finding that both easements satisfied *the 'reasonably necessary'* standard.

The Court of Appeal found that the evidence at trial established that:

- Road A was used to transport cattle and that it could be widened to better accommodate the larger haulage trucks;
- There were existing linkages between the cattle yards and therefore, Road A could be used to transport cattle from both yards; and
- Mr Griffiths himself owned equipment that was capable of widening those narrow parts of the road and there was no evidence to suggest that it would be costly or impractical to do so.

While the Court of Appeal accepted that there would be additional convenience in having access to both roads, the court was not satisfied that it was reasonably necessary for the effective use of Stuart Downs for access to be granted to Road D. The Court of Appeal, however, affirmed the trial judge's findings, namely that the impact upon Mrs Bradshaw was minimal and could be remedied by the payment of compensation. Moreover, the use of Road A was reasonably necessary for both personal and business uses of the Griffiths due to the increased travel times, the costs of a new road, and difficulties in traveling from the homestead to the old cattle yards if Road A could not be used.

Was Mrs Bradshaw's refusal to deny access to the roads reasonable?

Mrs Bradshaw also appealed against the trial judge's findings that she had acted unreasonably in denying continued access to the roads. Mrs Bradshaw placed emphasis on the fact that she had made two offers to resolve the dispute, the latter of which involved an offer to pay $106,655 toward the construction of the new road.

However, it was relevant that the reason for the withdrawal of consent was not found to be related to any issue or impact associated with the use of the roads. Rather, the withdrawal had arisen through a personal dispute, apparently relating to the Bradshaws' use of water from a water bore on their land, specifically in supplying that water to an energy company who was carrying out works in the area. As a result, the Court of Appeal affirmed the trial judge's findings on this issue.

Outcome

Ultimately, the Court of Appeal ordered that an easement be granted to Mr Griffiths over Road A, but not Road D.

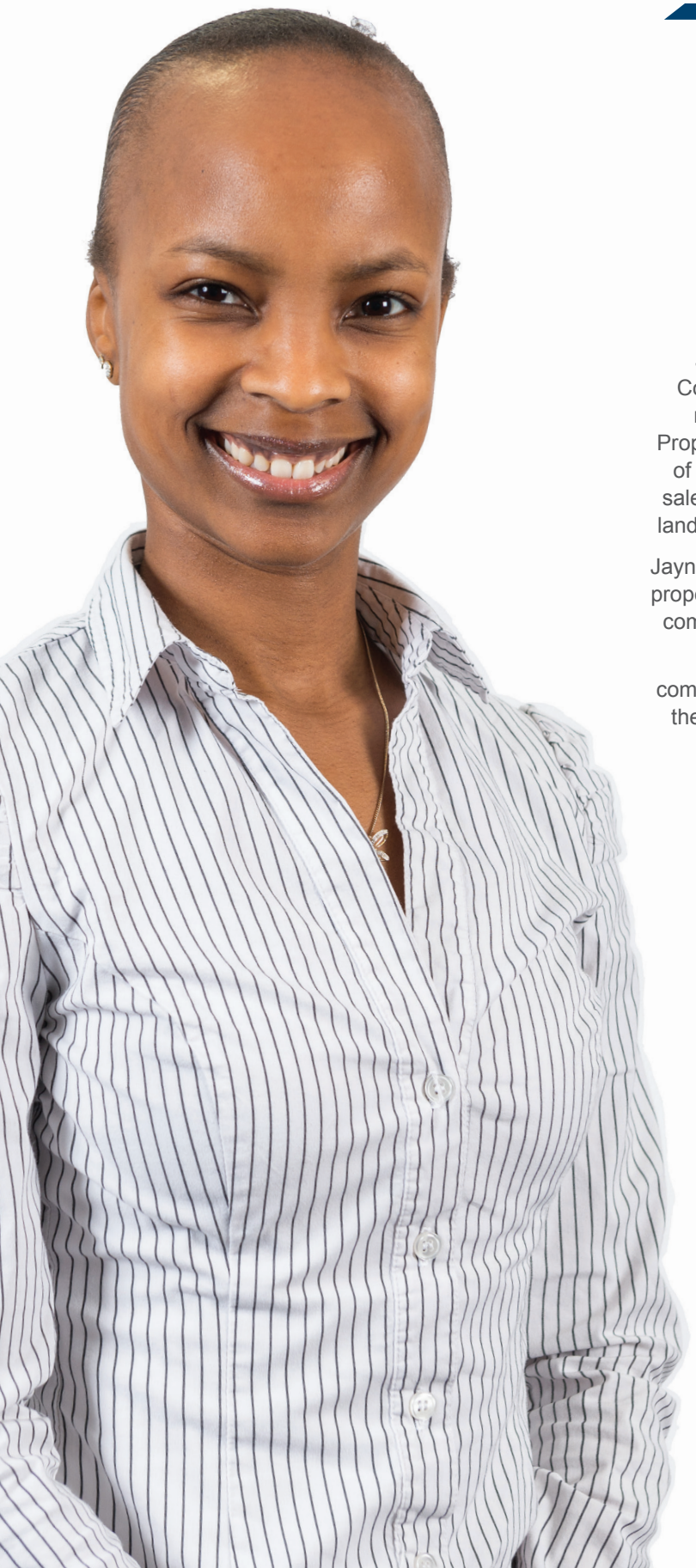
Mrs Bradshaw was not successful on the other grounds of appeal.

The trial judge had held that the financial impact of an easement over Road A was $25,000, which had not been challenged. On that basis, compensation for the easement was ordered at that amount.

This case provides valuable guidance on the application of the requisite standard under s 180 of the PLA to obtain a statutory right of user over land - namely that it must be *'reasonably necessary for the effective use of the dominant land'*. Although preference and convenience alone will not be sufficient, the case demonstrates that relief may be granted under s 180, even in circumstances where the dominant land can still be effectively used by constructing a new path of access, albeit at disadvantage and significant cost.

It is important to note that in this case, the impact of the easement upon Mrs Bradshaw and Laurel Downs was found to be minimal, which was a critical issue in the court's determination of these proceedings.

[1] *Griffiths v Bradshaw* [2015] QSC 176.



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Stigmatised Properties

What constitutes a 'stigmatised' property?

In essence, a property will be '*stigmatised*' if it has been associated with an undesirable event that has occurred (or which is suspected to have occurred) at the property or in its immediate vicinity.

While the event itself may have no physical impact upon the property itself, stigmas may affect the desirability of the property to prospective buyers and tenants.

Stigmas can be wideranging and may include:

- An untimely death (such as a murder or suicide);
- The scene of a violent crime (such as a serious assault, drug deal or sexual crime);
- Troublesome neighbours;
- Environmental conditions (for example, soil contamination, aircraft noise or industrial aromas); or
- Other factors of significance (for example, the suggestion that a property may be haunted).

Stigmas are subjective and may be dependant upon the particular cultural or religious background of the beholder, including any particular beliefs, superstitions, or experiences they may have.

What are the rules regarding disclosure?

There are no specific laws in Australia which stipulate when a developer or real estate agent must disclose a stigma attaching to a property.

However, state legislation and the codes and standards of conduct of the state and territory real estate institutes require real estate agents to act honestly, fairly and reasonably in their interactions with clients and third parties. They also proscribe agents' duties of disclosure and their obligations when interacting with third parties in relation to the marketing of a property for sale or rent.

By way of example, in Queensland, the REIQ Standards of Business Practice (**standards**) require

agents to act honestly in their disclosure to third parties. Specifically, article 9 of the Standards states, *inter alia*, that agents shall not engage in any conduct which is misleading or deceptive or is likely to mislead or deceive.

Under s 18 of the Second Schedule to the *Competition and Consumer Act 2010* (Cth) (**Act**) (formerly s 52 of the *Trade Practices Act 1974* (Cth)), corporations must not engage in misleading or deceptive conduct. Misleading or deceptive conduct includes not only positive actions such as making misleading or deceptive statements in relation to material facts, but it also includes a failure to act or silence (which, for instance, may lead potential buyers or tenants to make their own incorrect assumptions about material facts).

Accordingly, developers and real estate agents have an obligation to prospective buyers and tenants to disclose any information about the property which could be reasonably considered to be a '*material fact*' which is likely to influence a prospective buyer or tenant's decision to buy or lease a property or affect the price which they are prepared to offer to buy or lease the property.

It flows from this obligation that if a question is put directly to a developer or real estate agent about an event which has taken place at the property, it must answer honestly, so as not to contravene s 18 of the Act.

What constitutes a material fact that requires disclosure?

In determining what constitutes a '*material fact*' that requires disclosure in regards to a stigmatised property, potential buyers or tenants should be asked if they bring any particular sensitivity to the transaction, and then consideration must be given to the following factors:

- Does the stigma relate directly to the property itself (as opposed to the surrounding area)? (It should be noted, however, that while some stigmas may relate the surrounding area, they may also relate

directly to the property itself; for example, an industrial aroma).

- Does the stigma currently impact on the market value of the property?
- Is it likely that knowledge of the stigma would affect a potential buyer's or tenant's decision to proceed with the transaction?
- Could potential buyers or tenants reasonably expect that disclosure ought to have been made (particularly in circumstances where it is unlikely that the potential buyers or tenants could become aware of the stigma as a result of making their own enquiries)?

If the stigma relates directly to the property itself and the answer to any of the remaining questions is yes, then full disclosure ought to be made. In other circumstances, the maxim '*caveat emptor'* or *'buyer beware'* may apply and disclosure will only be required in response to a direct enquiry.

Another grey area is the distinction between the disclosure of personal information versus the disclosure of a material fact. Material facts relate to the property, whilst personal information relates to the individual parties involved in a property transaction. For example, a real estate agent may inform a prospective buyer that a serious crime had taken place at a property during the current ownership. The real estate agent provides this information because they judged the crime to be a material fact. However, if the real estate agent then goes on to discuss the parties involved in the crime, then are likely to be providing personal information.

The case law

The leading authority in respect of the sale of stigmatised property is a decision of the Administrative Decisions Tribunal of New South Wales in *Hinton & Anor v Commissioner for Fair Trading.*[1] The *Hinton* case concerned the failure of a real estate agent to reveal to potential buyers of a property that it was the scene of a horrendous triple murder in which a mother, father and daughter were murdered by their son. This was the notorious Gonzales murder, committed at the property, on 10 July 2001.

In *Hinton,* it was found that the real estate agent had not disclosed to the potential buyers that the property was the site of the triple murder and it was held that the agent:

- Concealed a material fact and, thereby, induced the buyers to enter into a contract, contrary to s 52(1) of the *Property Stock and Business Agents Act 2002* (NSW);
- Engaged in misleading or deceptive conduct, namely the non-disclosure of the murders which occurred at the property, in breach of s 42 of the *Fair Trading Act 1987* (NSW); and
- Failed to act honestly, fairly and professionally, in breach of rule 3(1) of the Rules of Conduct (NSW).

In making these findings, the Tribunal held that a positive misrepresentation had been made to potential

buyers to the effect that the owners of the property were moving out and the property was presented in a condition consistent with that statement. The Tribunal observed that:

> *'The applicants were consciously silent as to the property being the scene of the Gonzales murders. That was a fact that could not be discovered in the course of usual events by a properly advised purchaser. It was also a factor which would have had a significant impact on the minds of prospective purchasers in determining whether to make an offer to purchase the house at all, and if so, with respect to the price they would be prepared to pay.'*

The Tribunal reviewed the considerable body of the case law as to assessment of the materiality of a relevant fact. In *Karina Fisheries Pty Ltd v Mitson*,[2] it was held that:

> *'A fact will be material in the relevant sense if that fact be one that may (not would) have affected the exercise of the discretion on the part of the justice to issue the warrant.'*

In *Permanent Trustee Australia Pty Ltd v FAI General Insurance Company Limited*,[3] it was held that:

> *'The test of materiality under the previous law was whether the fact would reasonably have affected the mind of a prudent purchaser.'*

In *Hinton*, the Tribunal concluded, on the basis of its review of those decisions, that:

> *'A consideration of materiality involves an assessment of the relevance and significance of the fact in issue to the matter being determined. In this case … when considering the meaning of material fact in section 52 … two matters are pertinent to the issue of materiality:* ***the importance of that material fact would be likely to have on the making of the decision to enter into a contract or arrangement, and the relevance of the material fact to inducing a person to enter into a contract or arrangement.'***[4] *(emphasis added).*

So what is the best way to go about trying to sell a stigmatised property?

In order to ensure their own protection against recourse by any potential buyers, sellers and developers (and their real estate agents) should adopt a conservative approach and disclose all matters within their knowledge which they consider may affect the decision of potential buyers to enter into a contract to buy the property.

'All material facts which may influence a potential buyer with regards to a property must be discussed.'

Real estate agents have a duty to act in accordance with the instructions given by their client and to market the property to obtain the best sale price achievable. However, as indicated above, they also have an obligation to disclose all material facts which are likely to influence a potential buyer's decision to buy the property or which are likely to affect the price they are prepared to offer to buy the property.

Real estate agents should first obtain written permission from the seller or developer client prior to disclosing the presence of a stigma and, if the client refuses permission, the agent should consider whether or not to take any further part in the transaction.

Once permission to disclose a stigma has been obtained, the agent and the client should agree on the words that will be used by the agent when making the disclosure. Agents should ensure that the agreed disclosure statement is recorded in writing as an attachment to the appointment of agent.

1 (2006) NSWADT 257.
2 (1990) 26 FCR 476.
3 (2001) NSWCA 20.
4 See paragraph 118 of the judgment in *Hinton*.

Case Note

Haixing Group Pty Ltd v Mary Ann Chan [2015] NSWSC 1637

The New South Wales Supreme Court has provided a timely reminder of the importance of strictly adhering to the specific terms and express requirements of a call option in respect of the purchase of land.

Facts

Haixing Group Pty Ltd (**plaintiff**) entered into a Deed of Put and Call Option (**Deed**) in March 2015, in respect of a property situated in Burwood, New South Wales. The seller under the Deed was Mary Chan (**defendant**).

The Deed provided for the payment of a $250,000 option fee. Shortly after the Deed was entered into, the plaintiff registered a caveat over the land. The plaintiff purported to exercise the call option in September 2015. The defendant disputed that the call option had been validly exercised and issued a notice of proposed lapsing of the caveat.

The plaintiff applied to the Supreme Court seeking declaratory relief to the effect that it had validly exercised the call option. The plaintiff sought associated relief with respect to the maintenance of a caveat over the land to protect its interest in the property.

Issues

The key issue in dispute was whether the plaintiff had validly exercised the call option. The Deed relevantly required that before 10 September 2015, the plaintiff needed to deliver the following:

- A written notice of the exercise of the option;
- Two copies of the contract signed by the plaintiff and the guarantor; and
- A cheque for the balance of the 10% deposit payable under the Deed, less any credit for payment of the option fee.

The terms of the Deed also required that each of these documents be delivered personally. On 2 September 2015, solicitors acting for the plaintiff sent an email to the defendant's solicitors advising that the plaintiff would exercise the call option and deliver a signed copy of the contract for exchange on 10 September 2015.

Subsequently, on 9 September 2015, the plaintiff's solicitors sent a letter by courier to the defendant's solicitors enclosing a signed copy of the contract.

The defendant argued that the email on 2 September 2015 merely an amounted to a statement of intention to do something in the future, but not a notice of the present exercise of the option. Similarly, it was argued that the letter on 9 September 2015, which referred to the enclosed signed contract, did not include written notice of the exercise of the option.

The court observed that a purported exercise of an option must be clear and unequivocal. However, the court also emphasised that inflexible insistence on the precise terms of the relevant contract could lead to plain injustice. Compliance is essential, but in some circumstances, relief may be available if there has been a failure to achieve *'exact compliance'.*

In essence, it is a question of construction as to what the requirements are to exercise the option. The court expanded on the relevant principles with reference to the summary given by Kirby P in *Prudential Assurance Co Limited v Health Minders Pty Limited,*[1] namely that:

1. The purported exercise of the option must be clear and unequivocal. However, clarity and lack of equivocation are matters of opinion and impression, and inflexible insistence on form could lead to injustice. As such, the courts have developed a number of elaborations to the primary rule;
2. For example, it is not necessary that the purported exercise of the option conform precisely to the terminology used in the clause;
3. The relevant issue is what the recipient of the purported exercise of the option, would fairly have understood to be the meaning of the notice in all the circumstances;
4. Although a notice may misstate the terms of the option, it may nevertheless constitute an effective exercise depending on the circumstances. However, if the notice sets out an erroneous understanding of the option in an attempt to exercise it, the attempt may be unsuccessful; and
5. Each case must be decided on its own facts and on the appropriate construction of the option.

The court cited one particular instance where an option clause stated that the notice must be provided by pre-paid registered post. In that case, the clause was found as not stipulating the sole and essential method of sending notice.[2]

In the present case, the court found that it was reasonably arguable that the delivery of the letter and the executed contract on 9 September 2015, even without express reference in the text of the letter to the earlier email, would nonetheless cause the defendant to fairly understand, in all the circumstances of receipt, that the option was being exercised.

Similarly, it was not significant that the plaintiff had failed to deliver a cheque for the deposit, in circumstances where the plaintiff had paid the option fee, which reduced the deposit to $0. The court found that it was not logical or possible for a cheque to be delivered for $0 and therefore it was irrelevant that the plaintiff had not delivered a cheque.

However, the court ultimately found for the defendant because the plaintiff did not deliver two copies of the signed contract. The terms of the Deed clearly specified that two executed copies must be provided, but the plaintiff only delivered a single copy. The court found that having regard to the Deed as a whole, there was no reason to doubt that the delivery of two contracts was essential for the option to be validly exercised. The court observed that it was not merely a matter of administrative convenience, as the method would have allowed the defendant to retain an original copy bearing the plaintiff's and guarantor's signatures. On this basis, there was no serious question to be tried and the plaintiff's application was refused.

Implications

This case emphasises that strict compliance with the terms of an option is advisable, in order to ensure that any purported exercise of the option is effective. While the case demonstrates that relief may be available if there has been complete, but not *'exact compliance*', it is plainly preferable that precise compliance be achieved. Aside from ensuring an effective exercise of the option, achieving exact compliance will also reduce the likelihood of disputes arising.

[1] (1987) 9 NSWLR 673 [677].

[2] *Spectra Pty Limited v Pindari Pty Limited* [1974] 2 NSWLR 617.

Case Note

Orchid Avenue Pty Ltd v Goode [2014] QDC 217

Failure to complete off the plan contract for penthouse apartment on the Gold Coast.

Introduction

In the Federal Court decision of *Lewis v Orchid Avenue Pty Ltd* [2014] FCA 739, the buyers of an off-the-plan apartment in the Hilton Hotel and Residences complex in Surfers Paradise were held to the contract that they had entered into, despite their claim that they had been induced into entering into it as a result of misrepresentations made by the developer's sales agent.

Since that decision, a subsequent District Court decision, *Orchid Avenue Pty Ltd v Goode* [2014] QDC 217, has arrived at an entirely different result even though it involved an off-the-plan contract of an apartment in the same complex. The background and reasoning to this decision is set out below.

The facts

In July 2009, Paul Goode and Christine Barber (**buyers**), were on holiday in Surfers Paradise. At that time, the buyers lived in New Zealand. During their holiday, they visited the sales office for the proposed Hilton Hotel and Residences complex, which was operated by Orchid Avenue Pty Ltd (**developer**).

The following month, the buyers entered into an off-the-plan contract to buy an apartment in the complex and a separate contract to buy a furniture package for the apartment for a total purchase price of $930,000.

The buyers refused to complete both contracts on the date fixed for completion, 15 September 2011, and on 22 September 2011, the developer terminated both contracts and forfeited the deposit monies. The apartment and the furniture package were ultimately resold by the developer for $620,000, less selling expenses.

The developer issued proceedings against the buyers

claiming, *inter alia*, damages for breach of contract. The buyers alleged that they had been induced into entering into the contracts as a result of misleading and deceptive conduct by the developer's salesperson and sought orders under the *Trade Practices Act 1974* (Cth) (**Act**) (which was in force at the relevant time, but has now been replaced by the *Competition and Consumer Act 2010* (Cth), which is also known as the *Australian Consumer Law*) setting aside the contracts or alternatively compensation in an amount equal to the extent of any liability owed to the developer.

The representations and their context

At trial, it was accepted by the parties that during the buyers' visit to the developer's sales office in July 2009, a salesperson showed them a promotional video for the complex and advised them that there was a two bedroom apartment available for $930,000 and that there was only one apartment remaining at that price.

The buyers claimed that the salesperson told them that if they placed the apartment into the complex's rental pool, they would achieve a rental return of $1,000 per night at 80% occupancy. This was said to be based upon comparisons from other hotels of a similar standard in the area. The buyers claimed that they were advised that the hotel operator would take 47% of the income and they would receive the remaining 53%.

The salesperson made notes to that effect on a promotional brochure which the buyers kept. The buyers said that the salesperson also told them that buying off-the-plan was an attractive option, because once the complex was completed, the apartment would be worth $1,100,000.

The buyers negotiated a purchase price for the apartment that same day, with the developer agreeing to include a $35,000 furniture package within the $930,000 sale price. Based upon that agreement, the buyers returned the next day and paid a $5,000 holding deposit.

The salesperson then arranged an appointment for them with a local solicitor. She accompanied them to the solicitor's office and handed over a large bundle of contract documents. The buyers met with the solicitor on their own and signed the documents without reading them, and without having any particular aspects of the proposed contracts being pointed out to them. They were not provided with copies of any of the contract documents they had signed.

Two years later, on 30 August 2011, after the complex had been completed, the buyers returned to conduct a pre-purchase inspection. It was immediately obvious to them that the apartment would not return $1,000 per night. They sought legal advice and consequently refused to complete the contracts, alleging that they had been induced to enter into the contracts by the misleading and deceptive conduct by the salesperson.

The apartment returned a total of $3,909.47 over the following twelve months whilst the developer was attempting to sell it, an amount which the District Court Judge described as a *'pitifully small return'*.

The salesperson's evidence

The salesperson denied that she had made the representations alleged. She gave evidence that she had taken over 150 deposits and could not remember precisely what she had said to each individual buyer.

Although the salesperson could not specifically remember the buyers, she was adamant that she would not have told the buyers that their apartment would return $1,000 per night. When confronted with her handwriting to that effect on the brochure provided to the buyers, she said that she would only have used the $1,000 figure as an example. In regards to occupancy rates, she said she would have been guided by the occupancy rates on the Australian Bureau of Statistics website, and that if potential buyers had asked, she would have referred them to that website and would have let them read the statistics for themselves. She also denied advising the buyers about the apartment's projected capital value upon completion as she said that she did not have any information in July 2009 about the prospective value of the apartments upon completion.

The court's findings

On balance, the Judge preferred the evidence of the buyers. He said that the buyers struck him as:

> *'…very much the sort of people they purported to be, naïve investors who made what in retrospect can be seen to be a foolish decision as a result of reliance on what they had been told.'*

The Judge accepted that the salesperson made the two representations particularly relied upon, namely that the apartment would return $1,000 per night, on the basis of 80% occupancy. As to the representation of the value of the apartment upon completion, he also held that was also made, as supporting the other

representations, and because of his overall conclusion on the parties' credibility. He made a further finding that the buyers had relied upon those representations in deciding to enter into the purchase contracts.

Regarding the various disclaimers and '*no representation*' clauses contained in the contract documentation, the Judge found that the buyers had not had any time to consider the effect of the disclaimers and clarifications, which he noted were:

> *'…buried in a mass of paperwork, and the buyers were provided with no effective explanation of them either by the agents or by the solicitors, nor did the buyers discover them for themselves.'*

The Judge suggested that it was unlikely that any reasonable buyer would have read all of the documents put to them before signing the contracts.

The Judge found that the contractual disclaimers had not been brought to the buyers' attention, by either the salesperson or the solicitor, and he pointed out that in any event, those disclaimers were ineffective to override the provisions of the Act. He commented:

> *'It would make a travesty of the consumer protection provisions which are now contained in the Australian Consumer Law if provisions of this nature were effective, so that real estate agents could mislead and deceive to their heart's content and the developers who employ them could still take the benefit of the resulting contracts.'*

In relation to the solicitor's involvement, the Judge described the path from the sales office to the solicitor's door as a *'well-trodden'* one, and he commented that if the solicitor had questioned the buyers about any representations made to them, or had warned them of the contractual consequences of their purchase, he may not have stayed on the agent's panel of recommended solicitors for long. The Judge also noted that a property buyers' guide for the project, which was branded with the name of the solicitor's practice and provided to the buyers, was:

> *'…devoid of any warning to prospective purchasers of any disadvantageous features of the contract that they were being asked to sign.'*

In that context, the Judge dismissed the developer's suggestion that it would have been *'remarkable'* if the solicitor had not mentioned anything about the content of the contract documents to the buyers. On the contrary, the Judge said that it was entirely consistent with all of the evidence that the solicitor did not investigate the question of whether the buyers were relying upon any representations made to them by the sales agent.

For those reasons, the developer's claim was dismissed and judgment was entered for the buyers. The Judge invited the parties to make submissions on the costs of the proceeding.

Comparison with ***Lewis v Orchid Avenue Pty Ltd***

The key difference between this case and the *Lewis* decision is that in *Lewis,* the Federal Court was not persuaded that the misrepresentations alleged by the buyers had actually been made.

In both cases, the buyers were first time purchasers of investment property. However, in *Lewis*, the Federal Court found that Mr and Mrs Lewis were both commercially astute. Mr Lewis was in the property and construction industry and Mrs Lewis was in the insurance industry. Importantly, the salesperson in that instance had provided them with financial information relating to cash flow and capital growth projections, and this contradicted their allegation that misrepresentations about those matters had been made. They also made their own enquiries and sought and obtained independent financial legal advice about their proposed entry into the sales contacts. Their solicitor had warned them that their contract was not subject to finance, and had advised them to ensure that they were *'finance proof'.* When it subsequently turned out that they were unable to obtain sufficient finance to complete the purchase, they purported to cancel the contracts on the basis of unspecified false or misleading statements.

In contrast, in the present case, the buyers were not commercially astute, nor were they given any time to undertake their own independent enquiries or properly review the contract documentation before execution. Further, it was clear that they had relied almost entirely upon the representations which had been made to them by the salesperson.

Conclusion

A consideration of the two cases illustrates that the courts will not let buyers out of contracts they have entered into, provided that sales agents and developers have complied with their obligations in ensuring that buyers are fairly, adequately and accurately informed.

Sales agents and developers should never make any unsupported representations about future values or returns. In addition, agents should always recommend to prospective buyers that they seek their own independent advice and make their own enquiries. Where possible, buyers should be given the opportunity to take promotional material and documentation away with them to consider before entering into any contracts. Adhering to these practices will significantly minimise the risk of buyers attempting to avoid contracts on the grounds of false or misleading representations by the sales agent and/or the developer.

Case Note

Juniper Property Holdings No 15 P/L v Caltabiano (No 2) [2016] QSC 5

This decision provides a valuable illustration as to the potential dangers in buying off the plan property, in circumstances of deteriorating market and financial conditions between the contract date and the eventual construction of the property and settlement.

Facts

From 2006, Juniper Property Holdings (**plaintiff**) was in the business of marketing, constructing and selling units in the development of a new high-rise residential, retail and commercial complex at Surfers Paradise, known as 'Soul'. In April 2006, the units were being sold through off the plan contracts.

Carmelo Caltabiano (**defendant**) entered into a contract in May 2007 to purchase the planned penthouse apartment. This contract was in similar terms to an earlier contract entered into by the parties in July 2006. The parties had agreed to rescind and replace the original contract with the second contract. The contract price for the penthouse apartment was $16.85 million. Construction of the development occurred over the subsequent years and the plaintiff gave notice to the defendant that settlement was to occur on 10 August 2012.

The defendant ultimately failed to complete the contract and the plaintiff forfeited the deposit of $1,683,000 and commenced proceedings for breach of contract. The defendant counterclaimed and purported to rescind the contract on the basis of alleged misleading and deceptive conduct, perpetrated by employee of the plaintiff during pre-contractual discussions in relation to the penthouse. While not strictly relevant to the facts of this case, receivers and managers were appointed to the plaintiff on 25 October 2012.

Ultimately, the plaintiff sold the penthouse in April 2015 to a different purchaser for $7,000,000. The plaintiff claimed damages in the sum of $8,817,552.41 plus interest payable under clause 15.6 of the contract. This clause provided that the defendant was to pay interest from the agreed date of settlement, which had been extended by agreement from 10 September 2012 to 19 March 2014 when the plaintiff terminated the contract for breach. This amount was $3,843,184.

Issues

The defendant asserted that during pre-contractual discussions, the plaintiff's sales agent had informed him that a penthouse in the nearby 'Jade' complex development had been sold for $20 million, and that the Jade penthouse was inferior due to having a smaller floor area and being flanked by two other buildings which impacted upon its views.

The defendant additionally alleged that the sales agent informed him that the penthouse in another complex, the 'Q1' complex was sold in 2002 for $7.8 million, but was only half the floor size of the Soul penthouse.

In fact, the Jade penthouse was not sold until 2012, when it was sold for $7 million. The court found that while the sales agent may have said words to the effect that the Jade penthouse was '*going for $20 million*', this did not clearly support the allegation that the defendant had been positively told that the penthouse had been sold for $20 million, or at all.

In relation to the statements relating to Q1, it was found that while the sales agent likely did refer to the sale of that penthouse in 2002, the court did not accept that the sales agent also said that it contained half the floor area of the Soul penthouse.

It was also relevant that in 2010, the defendant attempted to on-sell the Soul penthouse and appointed agents to sell the property. At no point did

the defendant inform those agents about the alleged representations as to the value of the Jade or Q1 penthouses. It was observed that these matters could have been used as possible support for the value of the Soul penthouse. Moreover, it was relevant that the allegations of misleading and deceptive conduct were not raised until the defence and counterclaim was filed in the proceedings.

Prior to that juncture, the defendant had already sought legal advice in an effort to avoid the contract, and documents subpoenaed from his solicitors during this period did not provide any evidence of there having been discussions about the allegedly misleading and deceptive representations.

The Court went onto explain the difficulties in substantiating allegations of misleading and deceptive conduct, where the relevant representations were verbal only, and not corroborated by any supporting documentary or other evidence. In this regard, the court cited *Watson v Foxman* (1995) 49 NSWLR 315, where it was observed:

> *'Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.'*

In the circumstances, the court was not satisfied that the representations were made. In addition, in order to attract relief, it would also be necessary for the defendant to establish that he relied on the alleged representations to his detriment. The defendant's case was that he wholly relied on the alleged representations in substantiating the value of the Soul penthouse, and that he was unfamiliar with the Gold Coast property market and performed no independent valuation exercise.

The court described the defendant's story as '*incredible*'. In particular, the Court observed that the defendant was an astute businessman who had established a successful company. This company had itself acquired other businesses and property, and in the course of those transactions, it was observed that either the defendant or employees of the company had themselves performed due diligence investigations.

The plaintiff also argued that the '*entire agreement*' clause in the contract negatived any alleged reliance on the part of the defendant on pre-contractual statements. The court reiterated, however, that the mere existence of an '*entire agreement*' clause is not sufficient to defeat a claim for misleading and deceptive conduct, where reliance has been established on pre-contractual statements.

In any case, the court was not satisfied that the defendant had relied on the representations in entering into the contract. In the result, the plaintiff was entitled to damages for breach of contract and interest, equating to over $14 million.

Implications

As this was an off the plan contract, there was a number of years between the date when the contract was entered into and the date of settlement, during which the Soul complex and the penthouse apartment was constructed. That period also unfortunately coincided with the start of the global financial crisis which meant that the value of the penthouse was undoubtedly diminished by worsening global conditions and a weakening local property market, regardless of the actual value of the penthouse when the parties first entered into a contract in 2006.

This case serves as a reminder that a buyer under an off the plan contract will generally still be required to complete the purchase, even where there is a substantial decrease in the value of the property between the contract and settlement dates. While the occurrence of the global financial crisis was an extreme example of changing market conditions, this case nevertheless provides a valuable example of the difficulty in proving allegations of misleading and deceptive conduct in a property sales context, the general enforceability of sound contracts and of the risks involved in purchasing property off the plan.

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