Carter Newell LAWYERS

Property and Real Estate Gazette

5th edition

Carter Newell LAWYERS

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From the Partner

I am pleased to introduce the 5th edition of the Property and Real Estate Gazette.

Carter Newell has a longstanding history of acting on behalf of landowners and landlords, real estate agents, valuers, surveyors, industry bodies and property industry participants throughout Australia. We pride ourselves on sharing knowledge and our experienced property and insurance lawyers have compiled a succinct and practical analysis of topical cases in the areas of advertising communications, commercial property management, formation of contracts, duty of care, misleading and deceptive conduct, personal injury, planning and property law.

Of note in this Edition is the case note relating to *Than v Galetta* & Ors [2019] NSWDC 9 in which the NSW District Court found a property manager liable in negligence when the lighting in a common internal staircase was faulty and resulted in injury. Also of note is the article on page 36 relating to paper certificates of title no longer having any legal effect and the impact to parties who hold a certificate of title as a form of security over real property.

As a premier legal practice with offices in Brisbane, Sydney and Melbourne, we are confident that you will find this edition of the Property and Real Estate Gazette a useful resource. We welcome your feedback and any suggestions you may have for future editions (feedback@carternewell.com).

Johanna Kennerley
Partner

+ 61 (0) 7 3000 8308
jkennerley@carternewell.com

Contributing Editors

Bronwyn Clarkson
Partner

+61 (0) 7 3000 8346
bclarkson@carternewell.com

Michael Gapes
Partner

+61 (0) 7 3000 8305
mgapes@carternewell.com

Ben Hall
Partner

+61 (0) 3 9002 4502
bhall@carternewell.com

Kelly Alcorn
Partner

+ 61 (0) 7 3000 8377
kalcorn@carternewell.com

Andrew Persijn
Special Counsel

+61 (0) 7 3000 8416
apersijn@carternewell.com

Nicola Young Berryman
Senior Associate

+ 61 (0) 7 3000 8486
nyoungberryman@carternewell.com

Gemma Sweeney
Solicitor

+ 61 (0) 7 3000 8326
gsweeney@carternewell.com

Shaun Pryor
Solicitor

+ 61 (0) 7 3000 8331
spryor@carternewell.com

Special thanks to:

Katie Proctor, Paralegal
Kristen Wallace, Paralegal
Kate Watson-Brown, Research Law Clerk

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- **Kelly Alcorn** Partner

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- **Rebecca Stevens** Partner

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- **Michael Gapes** Partner
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Case Note

Eckford v Six Mile Creek Pty Ltd (No 2) [2019] FCA 1307

In the recent Federal Court of Australia decision of *Eckford v Six Mile Creek Pty Ltd (No 2)* [2019] FCA 1307, the buyer of land was awarded damages of $2,573,542.46 resulting from an unfulfilled promise of ocean views.

Background

In September 2007, Mr Eckford (**buyer**) observed a roadside advertisement for a land subdivision known as '*Avalon @ Coolum*', made up of about 60 undeveloped lots (**estate**). The estate was owned by Six Mile Creek Pty Ltd and its principal, Mr McLaughlin (**developers**). The developers had engaged Pangus Pty Ltd (**Pangus**) through a put and call option deed, who retained a real estate agent to market the estate (**sales agent**).

The buyer contacted the developer about the estate, who referred him to the sales agent. The sales agent provided the buyer with a sales brochure and plan for the subdivision of the estate, along with a price list dated 14 September 2007. The price list and plan described lots 17, 18, and 19 as being *'sold'* with prices recorded in the list.

The buyer had an interest in lot 10 (**property**) and inspected the property on two occasions. During the buyer's inspections of the property, the sales agent represented to the buyer that lots 17, 18, and 19, located on the boundary of the property, had building covenants which contained height restrictions limiting the height of any buildings, trees or vegetation that could disrupt any ocean views from the property. The sales brochure stated that many of the sections in the estate, including the property, would have *'ocean views FOREVER'.* The buyer subsequently purchased the property in November 2007 and built a house on the property, with the understanding that his ocean views would not be compromised by the neighboring properties.

Many years later, in February 2016, the buyer discovered that shortly after his receiving the brochure and price list in late 2007, lots 17,18, and 19 were sold to third parties, with no height restrictions contained in the building covenants in the contracts of sale.

The buyer subsequently commenced proceedings against the developers, alleging that they had engaged

in misleading and deceptive conduct and made false or misleading representations in contravention of ss 52(1) and 53A(1)(b) of the *Trade Practices Act 1974* (Cth) (which was in force at the time that the representations were made) (**Act**).

The buyer alleged that the developers had been a party to representations made regarding the effect and operation of the height restrictions and the nature of the 'sales' which had been completed for lots 17, 18, and 19. Additionally, the buyer claimed damages for the tort of deceit against the developers in respect of the representation in the price list dated 14 September 2007 that lots 17, 18, and 19 had been *'sold'*, when in fact the contracts had not settled and the developers had no reason to believe that the contracts were ever likely to be settled.

The issues before the Court

The Federal Court of Australia had to decide, firstly, whether the representations of the sales agent were attributable to the developers; secondly, whether the representations were misleading or deceptive; thirdly, whether the developers made the representations as to the price list knowing it was untrue, or were recklessly indifferent to the truth; and finally, whether the buyer actually relied upon the representations.

The Federal Court's decision

The developers argued that they did not provide or approve the price list being used in the marketing of the property and noted that they had engaged Pangus to deal with the buyer directly. However, the developers acknowledged that they had provided the sales agent with information relating to the *'sales'* described in the price list. The sales agent was also advised that if a buyer were to request any further information on the contracts for sale of any of the lots, it was to contact both Pangus and the developers. On this occasion, the sales agent had contacted the developers in relation to the contract for the property and the status of the contracts on lots 17, 18, and 19.

The Court considered that the developers had concealed the nature of the sales of lots 17, 18, and 19 in their discussions with the sales agent and held that it was the developers' duty to correct any false representations made by the sales agent before the sales agent acted on them to its detriment. The Court also noted that just because the sales agent was engaged by Pangus as a marketing agent, it did not mean that it prevented the sales agent from being viewed as an agent for the developers as well. The sales agent's representations were therefore considered to be attributable to the developers.

In relation to the representations themselves, the Court heard that the contract for lot 19 had been terminated, and the buyers of lots 17 and 18 had not complied with the contract conditions for finance on the properties prior to the representation to the buyer in September 2007 that the lots had all been *'sold'.* As such, the Court determined that those representations were misleading or deceptive, and objectively false.

The Court confirmed that the use of the word *'sold'* in relation to real property was ambiguous and that prospective purchasers would be aware that *'sold'* could imply that a contract of sale had either been completed or had been agreed to but was yet to be completed, subject to finance or other terms. As such, the representations that lots 17, 18, and 19 were *'sold'* were true, as the contracts had been signed.

However, in this instance, a file note recorded by a lawyer instructed by the developers indicated that the existing contracts were *'dodgy', 'a joke',* and *'not worth anything'.* The Court, taking into account this evidence, stated that the sales agent was not to know the developer's state of mind that these contracts were unlikely to proceed and that they were all subject to termination by the buyers. As such, the Court held that the developers engaged in misleading and fraudulent conduct by allowing the sales agent to republish the representation that these lots were *'sold'*.

Further, the Court accepted that the buyer would not have purchased the property had he known that lots 17, 18, and 19 would not be subject to height restrictions. The Court noted that the buyer was attracted to the property because of its ocean views and he was therefore willing to pay $895,000 for the lot based on the representations made.

Based upon its findings, the Court awarded the buyer $2,573,542.46 in damages plus costs.

Conclusion

This decision serves as a timely reminder that sales agents should seek the written approval of all sales and advertising material from their seller clients prior to publishing it or distributing it to prospective buyers. Agents should be vigilant when it comes to accepting representations made by sellers, particularly about future matters such as views, and they should make further enquiries of the seller and/or seek independent advice from appropriate experts if in any doubt about the accuracy of any of the representations being made.

Staff profile Commercial Property

Nicola Young Berryman

Senior Associate

With over 10 years' post-admission experience in property law, Nicola's specialist experience extends to major acquisitions and disposals, complex developments and large-scale leasing.

Nicola advises REITs, institutional investors and corporates on large-scale commercial and industrial acquisitions and disposals. In addition, she advises developers on flat land and strata title developments, and acts for both landlords and tenants on all aspects of office, retail and industrial leasing.

In addition to significant experience in property, Nicola also has experience across a range of commercial advisory work including drafting and negotiating significant commercial contracts, supply agreements, consultancy agreements, confidentiality agreements and standard terms of business. Nicola's post-admission experience spans practising in New Zealand and Australia, including Victoria and Queensland.

+61 (0) 7 3000 8486

+61 (0) 425 543 823

+61 (0) 7 3000 8488

nyoungberryman@carternewell.com

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Case Note

Raynor v Murray [2019] NSWDC 189

The recent New South Wales District Court decision of *Raynor v Murray* [2019] NSWDC 189 provides a timely reminder to all property professionals that online material, including emails, may attract an order for significant damages against the publishing party where the comments are found to be defamatory.

Background

Gary Raynor (**plaintiff**) was the chair of the strata committee of an apartment complex known as the Watermark Building in Manly, NSW. Ms Patricia Murray (**defendant**) was a tenant of a unit at the complex. The plaintiff brought proceedings pursuant to the *Defamation Act 2005* (NSW) (**Act**), against the defendant referable to an email she had sent to a number of unit owners of the complex.

The plaintiff had previously sent an email to the defendant on 31 August 2016 notifying her that her mailbox was unlocked. Each unit of the property had a standard locked and numbered letterbox. Eight months later, on 10 April 2017, at a time when there were media reports about mail thefts in the area, the defendant emailed the plaintiff again, noting that her mailbox had been left open. On 20 April 2017, the mailboxes at the building were broken into. After the break-in, the plaintiff sent an email to all residents asking them to secure their mailboxes, attaching a news article containing warnings to the effect that unlocked mailboxes may tempt thieves.

On 27 April 2017, the defendant responded to the plaintiff's email in derisive terms, asking for the plaintiff's opinion on the article and questioning how leaving her mailbox open could help a thief break into other locked mailboxes. On 28 April 2017, the defendant responded to the plaintiff setting out advice he had received from a locksmith.

The complex's mailboxes were broken into a second time on 2 May 2017. The plaintiff sent a further email to residents warning them of the issue and asking that they keep their mailboxes locked. On 5 May, when it appeared that the defendant's mailbox was open, the plaintiff sent an email to the defendant, asking if she had left it open, or whether it may have been opened by thieves.

On 24 May 2017, the plaintiff sent a further email to the defendant, along with her property manager, noting that the defendant's mailbox had been open '*for the last few days*'. The plaintiff noted that this could be a contributing factor to the last two mailbox thefts and asked the defendant to keep her mailbox locked in future. The plaintiff indicated in his email that the defendant may be required to pay to have the locks changed in future if the mailboxes for the building had to be rekeyed.

On 25 May 2017, the defendant replied to the plaintiff's email of 24 May 2017. In the reply email, which was the subject of the defamation claim, the defendant complained of being '*harassed by many emails*' from the plaintiff, suggesting that the instruction to lock her mailbox was only the '*the latest topic*' of emails received from the plaintiff. The defendant asked the plaintiff if he had opened the mailbox himself as part of his '*months of campaigning to have all residents comply with your demands*'. The email concluded with the complaint that the plaintiff's '*consistent attempt to shame me publicly is cowardly*' and that it was '*offensive, harassing and menacing through the use of technology to menace me*'. The reply email was sent to 16 other residents of the complex, including the plaintiff.

The plaintiff alleged that the following imputations arose from the defendant's email of 25 May 2017:

- that the plaintiff had unreasonably harassed the defendant by consistently threatening her by email;
- that the plaintiff had acted menacingly towards the defendant by consistently threatening her by email;
- that the plaintiff is a malicious person who sent threatening emails to the defendant and copied in other residents of the Watermark building for the express purpose of publicly humiliating the defendant; and
- that the plaintiff is a small-minded busybody who wastes the time of fellow residents on petty items concerning the running of the complex.

The defendant admitted that the email had been published. However, the defendant sought to rely on the defences of justification,[1] honest opinion,[2] qualified privilege,[3] and triviality.[4]

The issues before the Court

The issues before the Court were whether the imputations could be found in the email, whether the imputations were defamatory, and whether the relevant defences could be relied upon by the defendant, or whether the defendant had defamed the plaintiff in the circumstances.

The decision

The New South Wales District Court held that the email was capable of giving rise to each of the 4 imputations.

As to the defences, the Court held that a defendant must specify particulars of truth in order to support a plea of justification, as a person who publishes a serious allegation must know the facts that justify the allegations made.

The Court held that in this instance, the defendant was not able to impart any evidence that each imputation was true, but merely listed relevant emails and made assertions which essentially repeated key words of the imputations.

As to the first imputation, the Court found that the conduct of the plaintiff prior to the email in question was not threatening and did not amount to harassment, but rather was the proper conduct of an owner's corporation wishing to protect the interests of all occupants in the complex.

As to the second imputation, the Court found that the defendant had used the strongest adjectives she could find in order to embarrass the plaintiff and to imply that his conduct was criminal. The Court held that the defendant had no basis for making those allegations, and as such, it was held that the defendant had never actually felt menaced by the plaintiff but was rather enraged by his requests.

As to the third imputation, the Court held that the defendant had failed to establish any facts that justified the imputation that the plaintiff was a malicious person who sent threatening emails and copied other residents in emails for the express purpose of publicly humiliating the defendant.

As to the fourth imputation, the Court observed that the defendant had failed on each occasion prior to the email in question to read the plaintiff's emails, respond to them, or to comply with the requests of the plaintiff even after the break-ins and advice from police and news articles. As the defendant ignored these requests, the defendant necessarily failed to justify that the plaintiff was only wasting his time on petty matters.

The Court noted that the defence of honest opinion could only apply to the fourth imputation, which was the only imputation containing an opinion rather than stated facts. However, that defence failed, as any opinion found to have been made was not rationally based on the truth.

The Court considered the defence of triviality in light of the language used in the email. The words *'criminal'*, *'stalk'*, *'fixation'*, *'thieves'*, *'harass'*, *'offensive',* and *'menacing'* did not suggest trivial imputations. In addition, the Court noted the suggestion that the

plaintiff had staged the break-ins. In the circumstances, the Court found that publication of the email could cause the real possibility of harm to the reputation of the plaintiff. As such, it held that the defence of triviality had not been made out.

The defence of qualified privilege also failed, as the Court did not consider that the email was sent within a privileged occasion, in order to attract the defence, but rather the communication was made for the purpose of humiliating, belittling and insulting the plaintiff.

As no defence was established, the Court turned to the consideration of damages, observing that the defendant was well aware of the falsity of her allegations and that she was motivated by her ill will towards the plaintiff in making these allegations. In addition, the defendant had ignored three requests for an apology from the plaintiff. Taking into account the same, the Court ordered that the defendant pay general damages of $90,000 to the plaintiff along with aggravated damages of $30,000.

Conclusion

This decision, which forms part of a growing trend in defamation cases, is a timely reminder to all property professionals that care should be taken when preparing correspondence that will be published to a number of people, and which may impute defamatory remarks about an individual.

[1] Pursuant to s 25 of the Act.
[2] Pursuant to s 31 of the Act.
[3] Pursuant to the common law.
[4] Pursuant to s 33 of the Act.

Case Note

Than v Galletta & Ors [2019] NSWDC 9

In February 2019, the New South Wales District Court found that a property manager was liable in negligence when the lighting in a common staircase was faulty, resulting in injury to a tenant: *Than v Galletta & Ors* [2019] NSWDC 9.

Background

Karen Than (**plaintiff**) commenced proceedings against the property manager of her rental property and the five owners of the property (**defendants**), alleging they had breached their duty of care to her, resulting in injury.

The plaintiff lived in a flat on the first floor of a two-story building comprised of four flats. The property had a common internal staircase. The sensor lighting in the staircase had a history of malfunctioning.

At the time of the alleged incident, the plaintiff had become aware of a noise coming from somewhere within the building and had ascended the staircase of the property to investigate. At the time, the staircase was in relative darkness. The plaintiff had attempted to switch on the light, which no longer worked. After investigating the noise, the plaintiff misplaced her footing and tripped on the staircase, falling down the stairs and sustaining a fracture to her left foot.

The plaintiff and another tenant of the property had advised the property manager on 2 occasions prior to the incident that the sensor light was defective. After being advised of the malfunction for the first time, the property manager arranged for an electrician to attend to the light. However, the problem was recurrent, and around three months later, the property manager was again advised that the light was defective.

The property manager gave evidence at trial that he verbally advised the agency's usual electrician to fix the problem. No work order was issued to the electrician and there was no evidence to suggest that the electrician had attended to the light. The property manager had not followed up with the electrician but assumed that the light had been fixed. The Court found on the evidence that no electrician had attended since the plaintiff's second notification of the problem. The incident occurred 23 days after the second notification to the property manager of the defective light.

The plaintiff brought a claim against the property manager and the owners of the property on the basis that they had failed to properly inspect the property, had failed to repair the light, and had failed to properly warn her as to the condition of the light.

Issues before the Court

The issues for the Court to consider were:

- whether the defendants owed the plaintiff a duty of care, and whether that duty had been breached;
- whether the defendants' negligence caused the plaintiff's injuries;
- whether the defendants could rely on the defence of '*obvious risk*'; and
- the correct apportionment of liability between the property manager and owners.

Decision

In considering the first issue, the Court identified that the staircase was available to be used by a range of people at random; it was foreseeable to the defendants that the stairs might be unlit as a result of faulty lighting and that dark conditions may render the black treads of the stairs undiscernible. The Court accepted that persons such as the plaintiff could foreseeably have misplaced their footing and fallen on the staircase, even whilst holding onto the handrail in those conditions.

The Court held that, along with the owners of the property, the property manager had sufficient control over the inspections, maintenance and repair of the premises to attract a duty to take reasonable care against foreseeable risks of harm to the tenants of the property and other users of the staircase.

In considering whether the defendants had breached their duty of care, the Court referred to factors set out in the *Civil Liability Act 2002* (NSW) (**Act**). It found that the risk of falling down the staircase in darkness was not an '*insignificant*' risk of harm, and a reasonable

person in the defendants' position, knowing about the defective lighting, would have taken precautionary steps to avoid the risk. The Court suggested that the defendants could have adjusted the light fitting so that it always remained on, rather than relying on a sensor, or warning signs could have been used to alert individuals using the stairs of the risk.

Further, the Court held that there was a high probability that harm would occur in the circumstances, and that if an incident did occur, it could result in serious injury. The Court held that there would be no extensive burden on the defendants to have taken simple precautions to avoid the risk by, say, putting up a warning sign, or arranging for the repair of the light fixture.

The Court therefore found that the defendants were in breach of the duty of care that was owed to the plaintiff and had acted negligently in the circumstances leading to the plaintiff's fall.

In relation to the second issue before the Court, it was held that the injury sustained by the plaintiff was caused by the negligence of the defendants. The plaintiff would not have misplaced her footing but for the defendants' failure to take precautions to install working lights on the staircase.

As to the third issue before the Court, it found that the risk of someone falling down the staircase in darkness was not an '*obvious risk*'. The plaintiff was not aware of the full effect of the condition of the lighting and had not failed to keep a proper lookout for her safety.

The Court awarded the plaintiff a total of $333,003.65 in damages plus costs.

Both the owners and the property manager filed cross-claims against each other seeking indemnities for any liability found against them. The Court considered the terms of the property management agreement on foot. Whilst the agreement stated that the owners should indemnify the property manager, it only protected the property manager if the property manager had properly performed his obligations.

Although the property manager gave evidence that he had contacted an electrician to inspect the light after discovering it wasn't working for a second time, the Court found that the he should have inspected the light himself. The Court noted that the property manager had not consulted with the electrician about the problem or followed him up about it, nor had he immediately raised the issue with the owners.

In the circumstances, the Court found that this was not '*proper performance*' on the part of the property manager. The property manager's routine inspections in daylight were also not enough to indicate that he had adequately performed the contracted service.

The owners were able to prove that they had no contact with the tenant and were reliant upon the property manager to inform them of safety issues at the property.

The Court therefore held that the property manager should indemnify the owners of the property, on the basis that if the owners had been made aware of the state of the lighting, they would have responded promptly and correctly to the issue. Accordingly, the property manager was ordered to pay 100% of the damages to the plaintiff along with the costs of the claim.

Conclusion

This decision is a timely reminder to property managers that recurrent maintenance issues at a property may require a higher degree of attention and inspection, particularly where there is a risk of injury to tenants or visitors to the property. Property managers should take care to issue work orders until the matter has been resolved, rather than assuming the same.

In addition, this case outlines that whilst a property management agreement may include an indemnity provision in the property manager's favour, it may not be enforceable if the property manager's duties have not been carried out with the requisite level of care and skill.

Best Lawyers in Australia

Paul Hopkins
Managing Partner

Aviation Law, Insurance Law, Litigation, Professional Malpractice Litigation

Patrick Mead
Partner

Alternative Dispute Resolution, Construction/Infrastructure Law, Insurance Law

Rebecca Stevens
Partner

Insurance Law, Personal Injury Litigation, Product Liability Litigation

Bronwyn Clarkson
Partner

Natural Resources Law, Oil & Gas Law

Michael Gapes
Partner

Professional Malpractice Litigation, Real Property Law

Mark Brookes
Partner

Alternative Dispute Resolution, Insurance Law, Legal Malpractice Litigation, Professional Malpractice Litigation

David Rodighiero
Partner

Construction/Infrastructure Law, Litigation

James Plumb
Partner

Energy Law, Mining Law, Nature Resources Law, Oil & Gas Law

Andrew Shute
Partner

Alternative Dispute Resolution, Competition Law, Litigation

Luke Preston
Partner

Alternative Dispute Resolution, Litigation

Matt Couper
Partner

Corporate Law, Mergers and Acquisitions Law

Katherine Hayes
Partner

Professional Malpractice Litigation

Kelly Alcorn
Partner

Land Use and Zoning Law, Natural Resources Law, Planning and Environmental Law

Mark Kenney
Partner

Construction/Infrastructure Law

John Grant
Special Counsel

Construction/Infrastructure Law

Brett Heath
In-house Advocate

Alternative Dispute Resolution, Insurance Law

Peter Dovolil
Special Counsel

Insurance Law, Personal Injury Litigation, Product Liability Litigation

Elisha Goosem
Special Counsel

Insurance Law

Louise Edmonds
Special Counsel

Insurance Law

Lawyer of the Year

James Plumb, *Partner*
Oil & Gas Law (2021)

Rebecca Stevens, *Partner*
Product Liability Litigation (2020)
Personal Injury Litigation (2019)

Mark Brookes, *Partner*
Professional Malpractice Litigation (2021)

Case Note

Taylor v Fisher [2018] WASCA 126

In the decision of the Western Australia Court of Appeal of *Taylor v Fisher* [2018] WASCA 126, the Court revisited a landlord's duty of care to tenants.

Background

On 20 March 2013, Emily Taylor (**appellant**), was showering at her rental property when her left elbow came into contact with a ceramic soap holder on the wall of the shower recess, causing her to suffer a deep laceration to her left elbow.

The appellant issued proceedings against the owner of the property in the District Court of Western Australia seeking damages. Prior to the liability-only trial, the parties had agreed to the quantum of damages in the sum of $200,000 plus medical expenses of $23,060.32.

The soap holder had been damaged and repaired with glue prior to the appellant's family moving into the property. The appellant claimed that, at all material times, the soap holder was damaged and posed a danger to users of the shower.

The decision at trial

The appellant alleged that the owner was negligent by failing to rectify the damaged soap holder, or to take any precautions to protect the appellant, or warn her of the risk of harm that it posed to her, which she claimed was reasonably foreseeable in the circumstances.

The owner did not dispute that he owed the appellant a duty of care, however, he denied that the soap holder posed a foreseeable risk of harm to the appellant and that he breached any duty of care owed to her.

The appellant obtained expert evidence from a professor of ceramic engineering. The appellant's expert concluded that the damage to the soap holder was likely to have resulted from a failure of the adhesive (used to previously repair the soap holder), leading to the exposed sharp, fractured surface on the remainder of the soap holder.

Upon an analysis of the evidence, the trial judge concluded that the soap holder gradually deteriorated over the period of the appellant's family's tenancy, with two separate porcelain pieces breaking away from the soap holder very shortly before the alleged incident. In addition, the trial judge noted that on the available evidence, the soap holder became a danger to users of the shower no earlier than about a week before the appellant suffered the injury.

The standard of care in common law negligence was explained with reference to Justice Mason's statement in *Wyong Shire Council v Shirt* [1980] HCA 12, which summarised the questions to be considered in determining whether there has been negligent conduct (that is, a breach of a duty of care), namely:

- firstly, whether a reasonable person in the owner's position would have foreseen that his conduct involved a risk of injury to the appellant, or to a class of persons including the appellant; and
- secondly, what a reasonable person would do by way of response to the risk, including consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty, and inconvenience of taking alleviating action and any other conflicting responsibilities which the owner may have.

The trial judge reaffirmed that the duty of care owed by the owner to the appellant was to take reasonable care to avoid foreseeable risks of harm to her having regard to all the circumstances of the case.

The trial judge held that despite the owner's knowledge that the soap dish had previously been broken and repaired, he was not satisfied that the risk of injury from the soap holder was foreseeable at the time the owner leased the property to the appellant's family.

The trial judge noted that the owner was required to inspect the property from time to time in order to avoid any foreseeable risk of injury from defects which would be obvious to a reasonable person and of which an appropriate inspection might make him aware. However, the trial judge was not satisfied that the owner's failure to inspect the soap holder gave rise to a breach of his duty of care.

The trial judge concluded that the risk of injury from contact with the soap dish was not reasonably foreseeable and a reasonable person in the position of the owner would not have taken the measures proposed by the appellant in order to prevent the risk of injury. On that basis, the trial judge found that the owner had not breached the duty of care owed to the appellant and her claim was dismissed.

The appeal

The appellant filed a Notice of Appeal in the Western Australia Supreme Court, in which she argued that the trial judge:

- was wrong to find that the risk of injury was not foreseeable; and
- should have found that the owner breached the duty of care which he owed to her by failing to replace the soap dish prior to her suffering injury.

In relation to the first ground of appeal, the Court of Appeal agreed with the trial judge's conclusion that a reasonable person in the position of the owner would not have foreseen the risk of the soap holder deteriorating in such a way as to become a risk to the safety of users of the shower.

In relation to the second ground of appeal, the Court of Appeal did not consider that a reasonable person in the position of the owner would have considered that the risk of possible deterioration and consequent injury necessitated replacement of the soap holder before any deterioration was evident.

On the above basis, the appeal was dismissed.

Conclusion

Whilst the owner ultimately succeeded, this case serves as a timely reminder for owners and property managers to ensure that rental properties are regularly and thoroughly inspected for potential hazards and safety issues.

If an owner 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, owners and property managers should monitor any items that have previously been broken and repaired to ensure that the repairs are not deteriorating, resulting in a safety hazard.

Sarah Ewing

Senior Associate

Sarah Ewing is a Senior Associate in Carter Newell's Litigation & Dispute Resolution team where she acts primarily for corporate clients in major commercial litigation and insolvency litigation disputes.

She has extensive experience advising on complex, high value and multi-party disputes involving allegations of negligence, breach of contract, contraventions of the *Competition and Consumer Act 2011* (Cth) and *Corporations Act 2001* (Cth) issues.

+61 (0) 7 3000 8361

+61 (0) 407 147 200

+61 (0) 7 3000 8488

sewing@carternewell.com

Carter Newell LAWYERS

Case Note

Phung v Phung [2019] NSWSC 117

In February 2019, the New South Wales Supreme Court upheld an oral agreement for the sale of a residential property based on partial performance of a contract: *Phung v Phung* [2019] NSWSC 117.

Mr Cam Vinh Phung (**plaintiff**) commenced proceedings against his younger brother, Mr Cam Tai Phung (**defendant**), alleging that they had entered into an oral agreement for the sale of the defendant's property to the plaintiff for a largely reduced price. The plaintiff alleged that the defendant had partially performed the contract and was therefore specifically required to perform the remainder of the contract by transferring the title of the property to the plaintiff.

Background

The defendant was the owner of a residential unit located in Lidcombe (**property**).

The plaintiff alleged that he and the defendant had entered into an oral agreement in or around January 2010 for the transfer of the property to the plaintiff. In return for the transfer, he allegedly agreed to pay the defendant the sum of $180,000.

The defendant maintained that during their conversation, he had not agreed to transfer the title of the property but had only agreed that the plaintiff could live in the property for life. The defendant asserted that, in return for allowing the plaintiff lifetime occupancy of the property, he would accept the payment of $180,000 by instalments from the plaintiff. The defendant subsequently moved out of the property, allowing the plaintiff to move in and commence paying outgoings for the property.

By early March 2010, the plaintiff had paid $50,000 to the defendant by way of installments. A further conversation between the parties occurred in March 2010, wherein the defendant agreed that the remaining portion of the $180,000 could be paid by instalments of $200 per week. The plaintiff continued to make these payments to the defendant, along with further lump sum payments totaling $92,600 at the time of the hearing. In addition to these payments,

'His Honour commented that the document did not amount to a memorandum or note of agreement because it did not contain all the essential terms of the agreement.'

the plaintiff conducted a renovation of the property costing between $6,000 and $7,000. The plaintiff also continued to pay the outgoings of the property, totaling $27,000.

In September 2013, the defendant, at the plaintiff's request, prepared and signed a simple document which agreed to transfer the ownership of the property to the plaintiff in the case of his untimely death (**document**).

The plaintiff sought to rely on the document as a contract of sale, or in the alternative, argued that the agreement between the parties should be completed as the contract had been partially performed.

The defendant alleged that the plaintiff could not enforce a contract of sale because the document did not satisfy ss 23C(1) and 54A(1) of the *Conveyancing Act 1919* (NSW) (**Act**), which amounts to a requirement that a contract of sale for property must be in writing and must contain all essential terms of the agreement.[1] In the alternative, the defendant argued that if part performance could enforce the contract, he had been the subject of hardship as a result of his unequal relationship with his brother.

Decision

The Court had to determine four issues:

- whether a contract of sale arose out of the discussions between the parties;
- whether the contract of sale was required to be in writing;
- whether the plaintiff could rely on part performance to enforce the contract of sale and therefore the transfer of title to the plaintiff; and
- whether the defendant could rely on *'unfairness'* and *'hardship'* in the circumstances, to avoid transferring the title to the plaintiff.

The Court concluded that the plaintiff had established in his evidence that in January 2010, a contract for the sale of the property had been formed. The reasoning for this conclusion included the fact that the document prepared and signed by the defendant in September 2013 specifically referred to an agreement *'to transfer the ownership'* of the property.

The Court noted that, despite the defendant's limited use of the English language, his evidence suggesting that the agreement only allowed the plaintiff to live in the property for his life was unconvincing in light of his reference to a transfer of ownership. Justice Darke stated that, viewed objectively, the parties should be taken to have agreed that the plaintiff would pay $180,000 to the defendant in return for a transfer of ownership of the property.

Section 54A(1) of the Act states that no proceedings may be brought upon any contract of sale unless the agreement is contained in '*some memorandum or note'* and is signed by the party to be charged. The plaintiff submitted that the document prepared and signed by the defendant in September 2013 amounted to a memorandum or note of agreement within the meaning of s 54A(1) of the Act.

His Honour commented that the document did not amount to a memorandum or note of agreement because it did not contain all the essential terms of the agreement. Justice Darke paid particular attention to the fact that the document made no reference to the consideration to be paid for the transfer of ownership of the property to the plaintiff. Moreover, his Honour commented that the section 23C(1)(a) of the Act did not apply because the document did not create or dispose of any interest in land as required by the section. Therefore, the plaintiff's claim could not be

brought unless the Court found that the contract of sale had been partially performed.

The plaintiff therefore had to rely on the concept that the contract had been partially performed by the defendant in order to seek an order for specific performance of the contract. Justice Darke applied the test of *'unequivocal referability'*. That is, his Honour directed his enquiry to whether or not the parties had acted in a way that was unequivocally referable to some contract of the general nature alleged, in this case, a contract of sale for the property, rather than only enquiring whether the parties were performing the particular contract that they had allegedly tried to enter into.

Justice Darke concluded that the plaintiff had established on his evidence that the parties' actions were unequivocally referable to a contract for the sale of the property. In particular, his Honour noted that the plaintiff's act of taking possession of the property, carrying out renovations and paying outgoings in respect of the property amounted to sufficient acts of part performance.

The defendant argued that specific performance of the contract should have been refused on the grounds of unfairness and hardship. It was submitted that the agreement was unfair because of undue influence exercised by the plaintiff and the inadequacy of the purchase price. Further, it was alleged that the defendant would suffer great hardship if the agreement were enforced, as the actual value of the property was around $600,000.

His Honour was not convinced that the plaintiff occupied a position of influence over the defendant. This was because the evidence of the plaintiff's and defendant's sister suggested that the defendant would not be strongly influenced by the plaintiff.

With regard to the purchase price paid for the property being unfair, the Court noted that the agreed consideration must be looked at in the context of an *'intra-family'* transaction. His Honour was not convinced that this aspect of the agreement was unfair. Similarly, his Honour was not satisfied that the defendant would suffer great hardship.

Ultimately, Justice Darke made an order for specific performance of the contract such that the defendant was ordered to transfer ownership of the property to the plaintiff. His Honour also awarded the plaintiff his costs in relation to the matter.

Conclusion

Whilst this decision examined relevant sections of NSW's Conveyancing Act 1919, ss 10, 11, and 59 of Queensland's Property Law Act 1974 (Qld) require the creation or disposition of an interest in land to be in writing and signed.

This decision underlines the long-established principle that to establish whether an agreement has been reached, it is necessary to objectively look at the substance of what has been agreed in light of all of the evidence, not just the form. It also serves as a reminder that contracts for the sale of land do not necessarily need to be in writing in the literal sense to be binding on the parties if the parties are able to evidence an intention to be bound by their written communications and/or actions in respect to that sale.

[1] *Harvey v Edwards, Dunlop & Co Ltd* (1927) 39 CLR 302.

Beware of misleading and deceptive conduct in advertising

Real estate agents will inevitably make representations to attract potential clients (sellers or lessors), buyers and/or tenants. These representations may include the features of the property in order to attract potential buyers or tenants, or the services an agent provides in order to attract potential clients.

However, extreme care must be taken by agents to ensure that all representations are accurate and will not fall foul of the consumer protection legislation.

Section 18 of the *Australian Consumer Law* (**ACL**) prohibits conduct, in trade or commerce, which is misleading or deceptive, or is likely to mislead or deceive. Misleading and deceptive conduct is a broad concept which includes words, actions, and pictures. It is irrelevant whether there is an intention to mislead; what is relevant is the overall impression created by the conduct and its actual or likely effect on the target audience.

When advertising the services an agent provides in order to attract potential clients, it is important that the agent does not make false or misleading claims about the quality, value, price or benefits of the service.[1] The methods used by agents when advertising their services require consideration as to whether any statements made are incorrect or likely to create a false impression.

Bait advertising

Section 35(1) of the ACL provides that a person must not, in trade or commerce, advertise goods or services for supply at a specified price if:

a. there are reasonable grounds for believing that the person will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable, having regard to:

   (i) the nature of the market in which the person carries on business; and

   (ii) the nature of the advertisement; and

b. the person is aware or ought reasonably to be aware of those grounds.

Testimonials and reviews

Testimonials and reviews are often used by agents to promote their services in order to attract potential clients.

If using testimonials or reviews to promote a service, regardless of the platform used to advertise, agents must ensure that the testimonial or review accurately reflects the views of the person who provided it. It goes without saying that the use of a fake review or testimonial is likely to mislead or deceive and be in breach of s 29 of the ACL.

Comparative advertising

In circumstances where comparative advertising is used to promote the superiority of an agent's services over his or her competitors, care must be taken to ensure that:

- the comparison being made is accurate; and
- the services being compared are reasonably similar.

Agents must also consider how long the comparison will remain accurate.

Consequences

With respect to claims for breaches of s 18 of the ACL, damages will be calculated pursuant to s 236. The calculation of damages pursuant to s 236 entirely depends upon the particular facts of the case but is designed to compensate the injured person, in whole or part, for the loss or damage caused by the prescribed conduct.

In accordance with s 224 of the ACL, a pecuniary penalty may be imposed for a contravention of s 35 of the ACL regarding bait advertising.

Conclusion

Agents must be vigilant in ensuring that they comply with their legislative obligations when advertising the services they provide in order to attract potential clients. When preparing advertisements, agents should ensure that:

- they only provide current and correct information;
- the overall impression of the advertisement is accurate;
- any important limitations or exemptions are noted in the advertisement; and
- they support claims (e.g. the price achieved for the sale of a property) with facts and documented evidence where necessary.

Agents should also be prepared to correct any misunderstandings and have sufficient evidence available in order to substantiate any claims made in an advertisement.

……..

[1] Section 29 of the *Australian Consumer Law*.

Case Note

Khaled v NSW Land & Housing Corporation [2019] NSWDC 97

In April 2019, the New South Wales District Court dismissed a claim by a tenant of a property who sought damages for injuries sustained when she fell down a sloping walkway at the property.

Background

In 2008, Mrs Khaled (**plaintiff**) moved into a property in Hurstville with her husband and 8 children. The property was owned by Justine Davy (the second defendant) and was rented by the New South Wales Land & Housing Corporation (the first defendant) (**NSW Housing**), who sub-let the property to the plaintiff and her family.

On 13 October 2014, the plaintiff claimed to have slipped and fallen on a tiled sloping walkway which was the main access to and egress from the property. On 30 August 2014 and 1 September 2014, Mr Davy (the husband of the second defendant) applied a substance to the tiles on the walkway that he had previously used on a sloping area to create a non-slip surface. Mr Davy did not notify the plaintiff that he had done this.

The plaintiff maintained that her injuries were caused by the defendants' negligence and alleged that the defendants had breached their duty of care by:

- not engaging a licensed, competent tradesman to oversee the safety of the walkway;
- the application of a substance that was not suitable for the walkway; and
- failing to warn the plaintiff that the substance had been applied.

The evidence

Prior to the plaintiff's tenancy with her family, the property was tenanted and had been well cared for and maintained. Mr Davy's evidence, which was accepted by the Court, was that he and his wife had traversed the walkway on many occasions and had never found that the surface was slippery. Further, between 1992 and 2008, he had not received any complaints that the walkway was slippery or that anybody had ever slipped or fallen over on it.

The plaintiff and her family did not maintain the property, and by the time of her accident in October 2014, the property was dirty and in a state of disrepair. The Court stated that from the commencement of their tenancy in 2008 to the accident in 2014, the plaintiff, her husband, children, and people visiting the house used the walkway tens if not hundreds of thousands of times.

The plaintiff maintained that the walkway was slippery and that she had complained about the surface many times and that her children had slipped on the surface. The plaintiff also stated that she complained about the slipperiness of the walkway each time she saw Mr Davy.

The Court rejected the plaintiff's evidence and preferred the evidence of Mr Davy, that he received only one complaint in June 2011, which was from NSW Housing and not the plaintiff. Mr Davy's response to the complaint was to apply a non-slip product to the surface of the walkway. Mr Davey applied the product again in 2013, and in August 2014, he applied a different non-slip substance in circumstances where the previous applications has worn off over time.

The evidence from the parties led to a number of possibilities as to how the accident occurred – the tiles on the walkway may have been wet and subsequently slippery; there may have been leaf debris on the walkway; there may have been grime or a build-up of dirt on the walkway; or the soles of the plaintiff's feet may have been slippery. The only version of events that supported the plaintiff's claim was that the tiles on the walkway may have been wet and subsequently slippery.

Decision

The Court was not satisfied, on the balance of probabilities, that the tiles on the walkway were ever slippery, or in particular, at the time of the accident on 13 October 2014.

The Court held that the plaintiff's evidence did not establish that the tiles on the walkway were slippery. In addition, there was limited evidence that it was raining at the time of the accident. In this regard, the plaintiff's evidence was that she knew it was raining because she could hear 'drops on the roof'. She did not say that there was rain on the ground and the rainfall records revealed that it was more likely than not that there was no substantial rain until well after the accident. The Court held that the fact that only the plaintiff had

reported the slipperiness of the stairs supported the view that the tiles were not slippery.

In the circumstances, the Court concluded that the accident was caused by something other than the slippery tiles on the walkway.

In considering whether the defendants were negligent, the Court held that:

> *'…Apart from one complaint by Mrs Khaled, there was nothing to indicate to either defendant that there was a risk that a person might slip on the ramp. I find that neither defendant knew of that risk or ought to have known about it. For that reason, I conclude that the risk of a person slipping on the ramp and being injured when landing on the tiles was not foreseeable.'*[1]

The Court added that even if the risk were foreseeable, it was insignificant, given the many years that the walkway had been used without incident. The Court also stated that a reasonable person in the position of the defendants would not have taken the precautions relied upon by the plaintiff, including increasing the height of the handrail and using a qualified person to apply a non-slip product to the walkway. The Court found that:

> *'…it was reasonable in all the circumstances for the defendants to have done nothing.'*[2]

Accordingly, the Court awarded judgment for the defendants and ordered the plaintiff to pay the defendants' costs.

[1] [2019] NSWDC 97 [35].

[2] Ibid [41].

Case Note

Yeung v Santosa Realty Co Pty Ltd [2020] VSCA 7

In the recent Victorian Court of Appeal decision of *Yeung v Santosa Realty Co Pty Ltd* [2020] VSCA 7, the Court considered a lessor's duty of care to a tenant and the apportionment of liability between a lessor and a property manager

Background

On 14 May 2014, Ms Potter **(plaintiff)**, who was a tenant of a residential property in Victoria, slipped at night on the back stairs of her rental property and fractured her right ankle. The stairs were worn, slippery, unlit and had no handrail.

The plaintiff brought proceedings for negligence in the County Court of Victoria against both the owner of the property, Mr Yeung **(owner)** and the property manager, Santosa Realty Co Pty Ltd **(property manager).**

At trial, the judge found that both defendants had breached their duty of care to the plaintiff and were liable to pay damages of $433,899.80. Liability was apportioned two-thirds to the owner and one third to the property manager. The owner appealed the decision to the Victorian Court of Appeal.

The decision on Appeal

The owner claimed that it was the failure of the property manager to inspect the back stairs and detect the defects, especially the slipperiness of the stairs, and report the defects to him, which led to the plaintiff's injuries. Furthermore, the owner claimed that he had delegated the performance of his duty of care to the property manager and, as a result, the property manager should fully indemnify him in respect of his liability to the plaintiff.

The Court of Appeal granted leave to appeal and identified four issues to consider:

- did the owner delegate his duty of care to the property manager;
- did the owner take adequate steps to keep the premises in good repair;
- was it irrelevant that the owner received rental income; and
- was the apportionment wrong.

Issue 1

The Court held that the owner had delegated the performance of his duty of care to the property manager. The duty imposed on an owner can be delegated by the exercise of reasonable care and skill in engaging a competent contractor to take steps to keep the property safe and by confirming that the contractor took appropriate steps.[1]

The Court found that the trial judge had made several critical findings that revealed that had the property manager undertaken what was required of it under the management agreement, the plaintiff would not have fallen and sustained an injury. The management agreement between the defendants required the property manager to conduct routine inspection of the property and advise the owner what repairs were needed. A critical finding was that the property manager's obligation to inspect and report included identifying and recording visible or obvious risks and reporting them to the owner. However, the property manager failed to carry out an inspection of the back stairs.

The Court held that the defects were a visible and obvious risk. The foreseeable risk of injury was the slippery and worn nature of the back stairs, the missing handrail, and the absence of working overhead lighting. The unsafe nature of the back stairs was obvious and would have been revealed in the course of an ordinary inspection by the property manager.

The Court found that the trial judge erred in failing to draw the inference that the relevant risk fell within the responsibility delegated by the owner to the property manager. There was no relevant '*residual duty*' owed by the owner to the plaintiff. This was because the owner had not reserved for himself any aspect of the responsibility to identify obvious hazards.

The Court therefore concluded that the trial judge erred in finding that the owner had not delegated his duty of care to the property manager and in finding that the owner was in breach of his duty of care to the plaintiff.

Issue 2

The Court held that the trial judge had erred in finding that the owner had failed to take any real steps to ensure the property was in good repair and that he was best placed to identify defects in the premises. The owner's engagement of the property manager to conduct routine inspections ought to have been a sufficient step to avoid foreseeable risks from visible or obvious defects. The owner was entitled to rely on inspection reports prepared by the property manager as sufficient confirmation that the stairs were in good repair and did not need to inspect them himself.

Issue 3

The Court determined that it was irrelevant that the owner stood to benefit from rental income. The harm was not caused by a failure to pay for the stairs to be repaired, but rather by the failure of the property manager to inspect the stairs and detect the hazard.

Issue 4

The Court considered the issue of apportionment in light of the finding that the owner had delegated the performance of his duty of care to the property manager. In the circumstances, the owner was entitled to be indemnified by the property manager pursuant to Part IV of the *Wrongs Act* 1958 (Vic).

Conclusion

The appeal was allowed and the orders of the trial judge were set aside. The Court ordered that the property manager fully indemnify the owner with respect to all of the plaintiff's liability.

This decision demonstrates that a lessor's duty to take reasonable care to avoid a foreseeable risk of injury to tenants and visitors to a rental property can, in certain instances, be completely delegated to a property manager. This is a worrying development and property managers should therefore ensure that they fully understand their contractual obligations under their appointment and ensure that they comply with the same.

[1] *Jones v Bartlett* (2000) 205 CLR 166, 221 [193], 228 [217].

Securing body corporate approvals to obtain and implement a development approval that affects common property

Securing body corporate approvals to obtain and implement a development approval that affects common property – is one futile without the other?

Consent to the making of a development application that affects common property can be given by a body corporate. However, the implementation of the resulting development approval may require a resolution without dissent at a general meeting if the acquisition of common property is required or changes to the community management statement (**CMS**) are necessary.

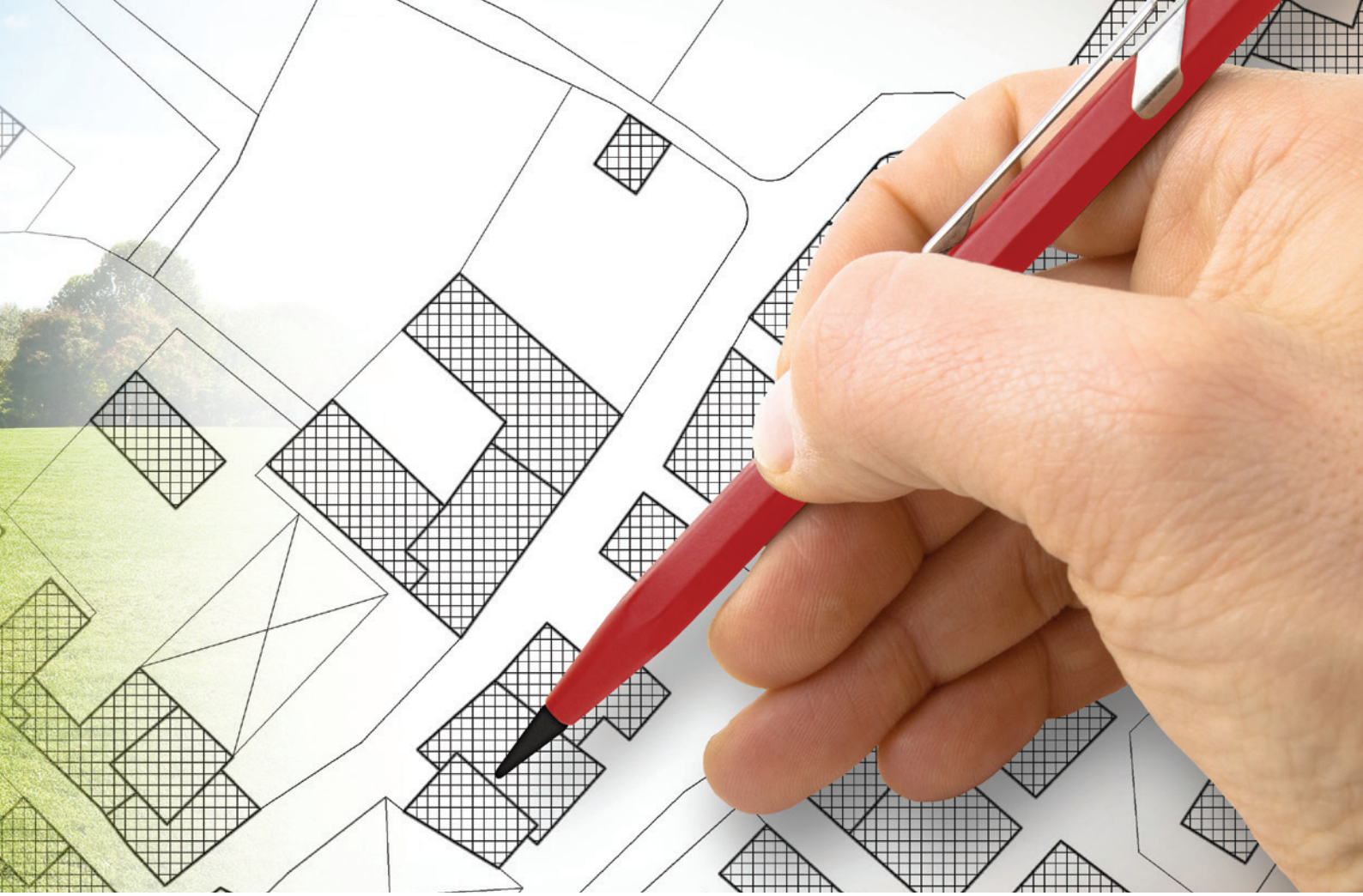
Despite the Queensland Planning and Environment Court rejecting the appellant's argument in *MTAA Superannuation Fund Pty Ltd v Logan City Council* [2016] QPEC 34 (**MTAA**) that the approval of a development application on the basis of consent given by the body corporate committee is a futility, in circumstances where implementation of the approval requires a resolution without dissent which ultimately may not be given, practically it may well be futile for a developer unless the opposition by other lot owners is shown to be unreasonable.

The requirement for owner's consent for a development application that impacts common property

Under the *Planning Act 2016*, a development application for a material change of use or reconfiguring a lot must be accompanied by the written consent of the owner of all of the land that is involved in the proposed use.[1] Failure to do so will mean that the development application is not properly made, and a consequent development approval may be invalid.[2]

A development application which affects a single lot within a community title scheme requires only the consent of the owner of that lot.[3] However, whether a development proposal affects common property in addition to the lot on which development is proposed is not always clear and should be considered carefully before lodging a development application.

Where a development proposal involves the use of common property for particular purposes other than for the ordinary right of access, or there is an increase in the intensity or scale of the use of the common property



as a consequence of the proposed development, the common property will form part of the premises the subject of the development application.[4]

Who is the owner of common property?

The '*owner*' of premises means the person who is entitled to receive rent for the premises or would be entitled to receive rent for the premises if it were rented to a tenant.[5] This is in most cases the registered property owner and may be an individual, a company or a body corporate.

Common property for a community title scheme is owned by the owners of the lots included in the scheme as tenants in common in shares proportionate to the lot entitlements of their respective lots.[6] Notwithstanding, for the purposes of the *Body Corporate and Community Management Act 1997* and the *Land Title Act 1994*,[7] it is the body corporate which is the entity that is entitled to receive the rent for the lease of the common property in the event that it were let to a tenant.[8] The body corporate is therefore the owner of common property for the purposes of providing owner's consent under the *Planning Act 2016*.

Obtaining consent from the body corporate to a development application over common property

In MTAA, a lot owner objected to and appealed the approval of a development application for a shopping centre expansion on lots and common property within a community titles scheme. The main ground of the appeal was that the body corporate committee did not have the power to consent to the making of the development application because it was a decision on a '*restricted issue*' pursuant to s 100 of the *Body Corporate and Community Management Act 1997* (**BCCM Act**), and therefore the development application had not been properly made and the development approval was invalid.

The BCCM Act states that a decision of the committee is a decision of the body corporate unless, under the

regulation module, it is a decision that changes the rights, privileges or obligations of the owners of lots in a community titles scheme (a '*restricted issue*').[9]

Under most regulation modules, a decision on a '*restricted issue*' may only be made by a resolution without dissent, which is passed at a general meeting. A resolution without dissent requires that no vote is counted against the motion.[10]

The Planning and Environment Court in the MTAA case followed the decision in *Rakaia Pty Ltd v Body Corporate for "Inn Cairns" Community Titles Scheme 16010*[11] in which the Court of Appeal found that a decision by the body corporate to provide owner's consent to the making of a development application over common property is not a decision which changes any rights, privileges or obligations of the owners of lots included in the community titles scheme (ie a '*restricted issue*'), rather it is the decision of the Council to approve the development application which has the potential to impact the rights of the owners.[12]

Accordingly, a decision to give consent to the making of a development application can be given by a body corporate committee, and is not a decision that requires a resolution without consent to be given at a general meeting.

What form of approval is required when the implementation of a development approval requires acquisition of common property or a change to the CMS?

Whilst the decision to give owner's consent to the making of a development application can generally be given by a majority vote of the body corporate committee, the implementation of that development approval may require a resolution without dissent if it necessitates the acquisition of common property or a change to the CMS.

In addition to the acquisition of common property which requires a resolution without dissent, a resolution without dissent is also required where the CMS needs to be terminated, changed or replaced,[13] an exclusive use by-law needs to be changed,[14] or the contribution schedule lot entitlements for the lots need to be changed in order to implement a development approval.[15]

When is an objection to a motion by a lot owner unreasonable?

The appellant's second argument in the MTAA case was that the granting of the development approval on the basis of consent given by the body corporate committee was futile in any event, as the implementation of the development approval would require the recording of a new CMS, requiring a resolution without dissent, which would not be achieved as the appellant would oppose the motion. The Court rejected this argument on the basis of the availability of a dispute resolution process under s 276 of the BCCM Act, whereby a lot owner's decision to oppose a motion will be subject to referral to an adjudicator and may be overturned if the owner's opposition is found to be unreasonable and it would be just and equitable to do so.

The Court in MTAA made specific reference to the then-recent Court of Appeal decision in *Albrecht v Ainsworth & Ors*,[16] as an example of where the remedies available under the BCCM Act were relied on to successfully overturn an owner's opposition to a motion.

The Albrecht case involved a dispute between lot owners within a residential community titles scheme regarding the proposed acquisition of 5m² of common property air space so that two balconies could be joined to create a larger deck. The grant of exclusive use had to be authorised by resolution without dissent. Mr Albrecht's motion was considered at an extraordinary general meeting and was defeated, with seven lot owners (ie 50% of the voters) opposing the motion.

Mr Albrecht referred the matter for adjudication with the Commissioner for Body Corporate and Community Management and was successful.[17] During the proceeding, the other lot owners opposed the proposed external changes to the scheme on architectural grounds on the basis that the change would be inconsistent with the original design intent. The adjudicator considered the competing architectural opinions and found that '*the proposed extension would have no noticeable detrimental impact on the building's architectural integrity*' [20]. She concluded: '*On balance I am not satisfied that the Body Corporate acted reasonably in deciding not to pass [the motion]*' [28].

The adjudicator's decision was overturned on appeal to the Queensland Civil and Administrative Tribunal (**QCAT**) and subsequently reinstated by the Court of Appeal. The objecting lot owners appealed to the High Court of Australia.

The Justices of the High Court unanimously allowed the appeal of the opposing lot owners, finding that the adjudicator and the Court of Appeal had erred in their approach, and reinstated the decision of QCAT.

His Honour Justice Nettle stated that the adjudicator had erred '*by exercising her own subjective judgment in what she conceived of as a balancing exercise aimed at assessing the appropriateness of allowing the improvements*' [7].

The High Court found that it is not the role of the adjudicator to reach his or her own conclusion as to whether it would be reasonable to approve the motion, rather, when resolving a dispute about opposition to a motion that required a resolution without dissent, the adjudicator's role was limited to determining whether the opposition to the proposal was unreasonable [@ 51]. The High Court commented that opposition to a proposal may be seen to be unreasonable where the proposal could not adversely affect the material enjoyment of an opponent's rights or where the opposition is '*prompted by spite, or ill-will, or desire for attention*' [9].

However, the High Court found that on the particular facts the proposal was sufficient to create a reasonable apprehension that it would adversely affect the opponent's rights, and in those circumstances, the opposition could not be found to be unreasonable.

It seems unlikely that the Planning and Environment Court's decision in the MTAA case would have differed if the High Court's judgment overturning the Court of Appeal's decision in the Albrecht case had been handed down, as the point being made by the Court in MTAA was that there is a remedy available under the BCCM Act in the event that lot owners oppose a necessary change to the CMS in order to implement the development approval, so that whether that relief would likely be given was not considered by the Court.

Notwithstanding, the High Court decision in the Albrecht case does highlight that, although there is a remedy available, whether opposition by lot owners to a development proposal is unreasonable will depend on the particular circumstances.

Conclusion

It is sufficient for owner's consent to the making of a development application that includes common property to be given by a body corporate committee. However, if the implementation of the development approval requires the acquisition of common property or a change to be made to the CMS, the implementation will require a resolution without dissent given at a general meeting.

Despite the Court's ruling in the MTAA case that the approval of a development application on the basis of consent given by the body corporate committee is not a futility in circumstances where implementation of the approval requires a resolution without dissent, which ultimately may not be given, practically, it may well be a futility for the developer unless the opposition by other lot owners is shown to be unreasonable.

[1] *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485.

[2] Sections 51(2), 51(4)(b) and 52(2)(b) of the *Planning Act 2016*.

[3] *Bartlett v Brisbane City Council* (2003) 133 LGERA 340.

[4] *Savage & Savage Resorts Pty Ltd as trustee v Cairns Regional Council* [2015] QPEC 37 [65], *Wright v Brisbane City Council* [2008] QPELR 10 and *Gascoyne v Whitsunday Regional Council* [2011] QPELR 373*, Davis v Miriam Vale Shire Council* [2006] QPELR 737.

[5] Definition of '*owner*' in Schedule 2 Dictionary of the *Planning Act 2016*.

[6] Section 35(1) of the *Body Corporate and Community Management Act 1997*.

[7] Sections 36, 94, and 152 of the *Body Corporate and Community Management Act 1997*.

[8] *Wright v Brisbane City Council* [2008] QPELR 10.

[9] Section 100 of the *Body Corporate and Community Management Act 1997*.

[10] Section 105 of the *Body Corporate and Community Management Act 1997;* s 42(1) of *the Body Corporate and Community Management (Accommodation Module) Regulation 2008*; s 18(1) of *the Body Corporate and Community Management (Commercial Module) Regulation 2008*; s 18(1) of *the Body Corporate and Community Management (Small Schemes Module) Regulation 2008;* s 42(1) of *the Body Corporate and Community Management (Standard Module) Regulation 2008*.

[11] [2012] QCA 306.

[12] *Rakaia Pty Ltd v Body Corporate for "Inn Cairns" Community Titles Scheme 16010* [2012] QCA 306 [40] – [43] and *MTAA Superannuation Fund Pty Ltd v Logan City Council & Anor* [2016] QPEC 34.

[13] Sections 62 and 78 of the *Body Corporate and Community Management Act 1997*.

[14] Section 171 of the *Body Corporate and Community Management Act 1997*.

[15] Section 47A of the *Body Corporate and Community Management Act 1997*

[16] [2015] QCA 220 [83].

[17] Section 275 of the *Body Corporate and Community Management Act 1997*

Case Note

Bowyer Group Pty Ltd v Cook Shire Council & Anor [2018] QCA 159

The Queensland Court of Appeal confirms that the consent of lessees is not required for the making of a development application under Queensland planning legislation.

Background

On 29 September 2015, David Oriel Industries Pty Ltd, lodged a development application with the Cook Shire Council for a material change of use for an extractive industry.

The land that is the subject of the development application was the subject of a rolling term lease granted under the *Land Act 1994* to William, Kevin and Neville Jackson (**Crown lessees**) for pastoral purposes, which was due to expire on 31 December 2045.

The development application was accompanied by the consent of the Department of Agriculture and Fisheries on behalf of the State of Queensland but not the consent of the Crown lessees.

Issues

Bowyer Group Pty Ltd (**Bowyer Group**), the owner of adjoining land, contended that the development application was not '*properly made*', as:

- the now repealed *Sustainable Planning Act 2009* required the development application to be accompanied by the written consent of the owner of the land the subject of the development application; and
- the Crown lessees were an owner of the land the subject of the development application whose consent was not included.

The parties agreed that the *Sustainable Planning Act 2009* required the development application to be accompanied by the written consent of the owner of the land the subject of the development application.

However, Bowyer Group contended that the definition of '*owner*' under the *Sustainable Planning Act 2009* was capable of permitting more than one class of owner, being in this case both the State and Crown lessees.

Planning and Environment Court decision

The Planning and Environment Court examined the definition of '*owner*', which was defined in the *Sustainable Planning Act 2009* as follows:

> *'**owner**, of land, means the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent.'*

The Planning and Environment Court at first instance then identified the question for determination as being whether the Crown lessees as '*owners*' were '*entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent*'.

The Planning and Environment Court examined whether, under the *Land Act 1994*, Crown lessees could only sublease the land where certain prerequisites were met, namely, where:

- the Minister has given written approval to the sublease;
- the lessee holds a general authority; or
- a stated mandatory standard terms document forms part of the sublease.

The Planning and Environment Court found that, as none of the pre-requisites for subleasing the land had been met in this case, the Crown lessees had no entitlement to sublet or receive rent for the land.

On this basis, the Planning and Environment Court found that the Crown lessees were not an owner whose consent was required to accompany the development application.

Court of Appeal decision

The Court of Appeal agreed with the ultimate decision of the Planning and Environment Court that the Crown lessees were not an owner whose consent was required to accompany the development application.

However, the Court of Appeal identified that the Planning and Environment Court did not determine that the Crown lessees could not be owners and, in

fact, proceeded on the assumption that they could be, but that they did not meet the required pre-requisites in this case.

The Court of Appeal found that the natural and ordinary meaning of the definition of owner supported by the body of case law involved 2 alternative limbs, that is, that the owner is either the person who is currently entitled to receive the rent for the land or, where the land is not currently let, the person who would be entitled to receive the rent for the land if it were let to a tenant.

The Court of Appeal found that the State was principally entitled to receive the rent for the land from the lessees under the rolling term lease and that there was no reason to extend the definition of owner to include any person in addition to the person principally entitled to receive the rent for the land who may be, or become, entitled to receive a payment by way of rent from a sub-lessee or even a sub-sub-lessee.

The Court of Appeal found that to do so would give lessees a right to veto the making of a development application in respect of land to which their interest is limited, and it noted that the right of lessees under the *Sustainable Planning Act 2009* is to object to the development proposal on its merits as a submitter.

Note: The *Sustainable Planning Act 2009* has since been repealed and replaced by the *Planning Act 2016,* however, the requirements for a development application to be accompanied by the consent of the owner and the definition of owner is substantially the same.

Paper titles becoming obsolete

In an attempt to increase efficiency and prevent unnecessary duplication, on 26 March 2019 the Queensland Parliament made a further effort to transition to an electronic conveyancing system by passing the *Land, Explosives and Other Legislation Amendment Act 2019* (**Amending Act**). As a result, a number of amendments to the *Land Title Act 1994* (Qld) (**Act**) commenced operation on 1 October 2019, and paper certificates of title no longer have any legal effect.

A certificate of title is a paper record of ownership and current registered interests of a lot recorded on an infeasible title held in the Freehold Land Register. As of 1 October 2019, paper certificates of title have ceased to be issued, and the only legal record of title is now held electronically on the Freehold Land Register.[1]

Whom does this change affect?

Despite Queensland operating an electronic titling system since 1994, paper title certificates continued to be available upon request until 1 October 2019. The changes implemented by the Amending Act affect the 11% of landowners who hold a paper certificate of title,[2] however, it also affects lenders and other parties who hold a certificate of title as a form of security over real property.

Before 1 October 2019, if a paper certificate of title had been issued, it had to be presented to the Titles Registry before a dealing in respect of a lot could be registered. The Amending Act removed this requirement,[3] as certificates of title are no longer instruments under the Act and will not be accepted as evidence of an indefeasible title for the lot upon which it is issued.[4]

Ongoing security for mortgagees

Under s 75 of the Act (now repealed), an equitable mortgage over land could be created by leaving a certificate of title with a mortgagee. This allowed the mortgagee to rely on the certificate as security by preventing any dealings with the land without

the mortgagee's consent. However, the removal of paper certificates of title as of 1 October 2019 sees s 75 also removed from the Act.[5] This does not affect parties' rights or obligations under existing equitable mortgages created prior to 1 October 2019.

Similar adoption in NSW and VIC

Each Australian state and territory has similarly adopted the Electronic Conveyancing National Law (**ECNL**) in their own jurisdictions, in one way or another.

In 2018, as part of the adoption of the ECNL, New South Wales and Victoria commenced the process of converting paper certificates of title to electronic certificates as part of the broader transition to electronic conveyancing. This has required the development of electronic lodgement network operators (**ELNO**) to facilitate electronic lodgements. Property Exchange Australia Limited is the main ELNO being used, but Sympli Australia Pty Ltd became Australia's second ELNO in November 2018. Both New South Wales and Victoria jurisdictions are moving towards a complete take up of electronic lodgements, however, at this stage, those states have not fully phased out paper certificates of title.

[1] See s 241 and s 247 of *Land, Explosives and Other Legislation Amendment Act 2019*.

[2] '*Titles Registry: Paper certificates of title*', Queensland Law Society (Web Page, 3 April 2019) <https://www.qls.com.au/About_QLS/News_media/News/Titles_Registry_Paper_certificates_of_title>

[3] See s 243 of *Land, Explosives and Other Legislation Amendment Act 2019*.

[4] See s 247 of *Land, Explosives and Other Legislation Amendment Act 2019*.

[5] See s 242 of *Land, Explosives and Other Legislation Amendment Act 2019*.

Case Note

Ma v Francis [2019] NSWSC 1244

In September 2019, the New South Wales Supreme Court dismissed a claim by the seller of a property seeking a determination that the buyer was not entitled to exercise a right of rescission because of the operation of s 66T(c) of the *Conveyancing Act 1919* (NSW).

Background

The subject property was due to proceed to auction on Saturday, 26 May 2018. The defendants were the only registered bidders, a fact that was known to the auctioneer and sales agent. A contract of sale was entered into by the plaintiff and the defendants for $5.7 million, with a deposit of $570,000.

On Thursday, 31 May 2018, the defendants served a notice of rescission pursuant to s 66U of the *Conveyancing Act 1919* (NSW) (**Act**) and sought the return of the deposit.

Section 66U of the Act relates to cooling off rights and provides that:

'1. The purchaser under a contract for the sale of residential property may serve a written notice to the effect that the purchaser rescinds the contract.

2. The notice may only be served during the cooling off period, but is ineffective if served after completion.'

The plaintiff contended that there was no cooling off period due to the operation of s 66T(c) of the Act, which provides that:

> *'There is no cooling off period in relation to a contract for the sale of residential property if:*
>
> *…(c) the contract is made on the same day as the property was offered for sale by public auction but passed in…'*

The case, therefore, involved the proper construction of s 66T(c) of the Act.

The evidence

The Court considered that the most reliable evidence of what took place on 26 May 2018 was an email from the auctioneer to the sales agent sent on 31 May

2018. While the Court did not regard the auctioneer as a satisfactory witness, it noted that when he sent the email the events were fresh in his mind and he was aware that the defendants were attempting to rescind the contract.

Prior to the commencement of the auction, which was scheduled for 10.30 am, the agent and the auctioneer took the defendants aside with a view to reaching an agreement on price. The auctioneer agreed that '*at this stage*',[1] the auction had not commenced. The auctioneer also left the negotiations with the defendants to make an announcement to the crowd downstairs, which included the words '*the full show is not going to take place just now*'.[2]

The Court regarded the agent as even less satisfactory as a witness than the auctioneer, noting that he was frequently non-responsive and evasive.[3]

The Court held that the agent and the auctioneer:

> *'…clearly believed that the most effective way to achieve the best possible price for the vendor was to enter into private negotiations with the defendants, rather than by conducting an auction in which there was only one registered bidder and having the property passed in.'*[4]

Decision

The Court concluded that the property was not passed in, nor was it offered for sale by public auction. The Court added that the facts support a conclusion that s 66T(c) of the Act does not apply and the plaintiff's attempt to '*fit the facts within the language of the section is strained.*'[5]

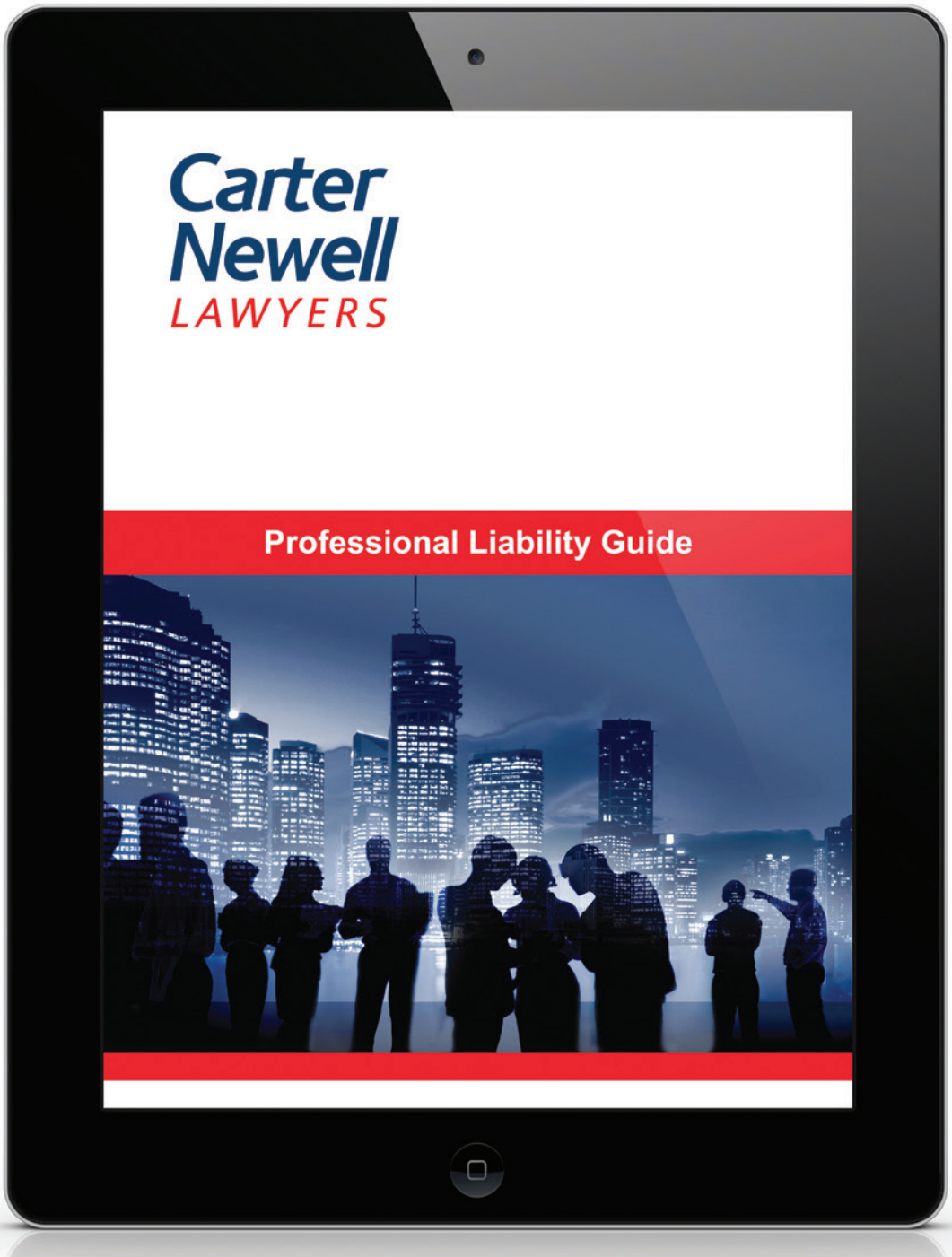
Accordingly, the Court dismissed the plaintiff's claim with costs.

The Court also provided useful commentary regarding the phrases '*offered for sale by public auction*' and '*passed in*' within the confines of the Act:

> *'(a) a property is 'offered for sale by public auction' when a competitive sale takes place at which a person has, or persons have, the opportunity to bid and re-bid for the property on the basis that a sale will be made to the highest bidder, in circumstances where the bidder or bidders do not know the vendor's reserve. The process requires the auctioneer to open the auction and request bids. Merely to advertise a sale by public auction or to gather a crowd in an auction room does not constitute the offering of the property for sale by public auction; and*
>
> *(b) a property is 'passed in' after a property has been offered for sale by public auction, when the auction is stopped without the property being sold. This will usually be because there is no bid or because the highest bid is less than the vendor's reserve and does not result in a sale of the property.'*[6]

The decision provides a timely reminder for sales agents and auctioneers to consider the course of action taken when a property is to proceed to auction, in particular noting whether a buyer may be afforded rights during a cooling off period.

1 [2019] NSWSC 1244 [8].
2 Ibid [10].
3 Ibid [13].
4 Ibid [16].
5 Ibid [24].
6 Ibid [25].



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