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NEWS

When are pre-sales representations misleading or deceptive?

A recent case involving pre-sales statements about the availability of parking serves as a timely reminder to vendors and agents to take care when making pre-sales statements or representations. Here, partner Mark Lyons takes a look at the outcome of the case and also highlights that purchasers should ensure any representation made by or on behalf of the vendor is expressly set out in the contract if the purchaser intends to rely on it.

BACKGROUND

The case involved a residential property with a two-car garage plus a strip of land comprising one-third of the width of a common driveway providing access to the property and two other properties.

At the time of purchase, two signs on a wall abutting the property's strip stated 'Private parking space 24' (24 being the street number of the property). These signs did not appear to be new.

Online marketing materials advertised the property to include a 'Double garage plus private off-street and driveway parking'. A detailed site plan showed images of three cars parked end to end on the property's strip. Small print at the bottom of the plan disclaimed any responsibility for the accuracy of the plan. The printed brochure for the property stated there was 'plentiful parking' and included the same plan with the disclaimer.

The property was purchased for \$9.4 million. The purchaser's husband, who had more than 15 years' experience in property development, conducted the negotiations and made the decision to proceed with the purchase. Shortly after settlement, an adjoining lot owner advised the purchaser that the whole driveway was a right of way and she was not entitled to park on the strip.

SUPREME COURT DECISION

The purchaser commenced proceedings in the New South Wales Supreme Court against McGrath Sales Pty Ltd, the vendor's selling agent, for damages for misleading and deceptive conduct for the alleged pre-sale misrepresentations about the availability of parking at the property.

The Supreme Court concluded that whilst McGrath's misrepresentations constituted misleading and deceptive conduct that conduct had not caused the purchaser any loss. The court said the parking was not the main reason the purchaser bought the property, rather it was an emotional attachment.

The purchaser appealed to the Court of Appeal.

COURT OF APPEAL DECISION

The Court of Appeal dismissed the appeal for several reasons.

- The purchaser's husband had considerable experience and success in property development, whereas McGrath was a suburban real estate agent which did not profess any legal or valuation expertise.
 - The transaction involved the purchase of an expensive residential property where a prospective purchaser would reasonably have been expected to obtain legal advice, rather than relying on statements made by the vendor's selling agent. In fact, the purchaser's husband obtained advice from a solicitor and a valuer about the purchase and his solicitor informed him the common driveway was subject to a right of way for the other properties.
 - All the marketing material contained a disclaimer which extended to oral representations made by McGrath about the parking.
 - The contract contained a clear warning that the purchaser entered the contract independent of any representations made by the vendor or its agent.
 - A reasonable purchaser in this position would have taken from their inspection of the property the relevant marketing material, and their oral communications with McGrath that the information it provided about parking was obtained from the vendor and McGrath was not guaranteeing its accuracy. They would have understood McGrath was merely passing on information from the vendor about parking on the strip.
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CONCLUSION

Purchasers, vendors and agents should take note of this important reminder about reliance on pre-sales statements in property transactions. Our lawyers can help you understand the consequences and answer your queries.

Authors



MARK LYONS

Partner