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NEWS

Marketing off the plan builds

A recent Federal Court case highlights the importance of ensuring marketing material for off the plan builds is accurate to avoid misleading and deceptive conduct. Lawyer Sarah Sherman explores the key learnings for developers.

KEY TAKEAWAYS

- Promotional material should not include images or features which the developer knows cannot be achieved.
 - The use of phrases such as 'artist's impression' and 'indicative only' or disclaimers in the material will not always be sufficient to protect from liability for misleading and deceptive conduct.
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FACTS

The buyers entered into an off the plan contract of sale for a luxury apartment to be built in Melbourne.

Before entering into the contract, the buyers were shown several promotional materials, viewed a display suite with a scale model of the building, and viewed various artist's impressions of the completed building.

The photos showed the apartment would have a seamless transition between the indoor and outdoor spaces, with uninterrupted views. This was the key attraction for the buyers.

Based on the promotional material, the buyers entered into a contract of sale for \$9.58 million.

Unfortunately, the apartment could not be built as depicted due to structural requirements. While the architects had told the developers before the contract of sale was entered, they did not advise the buyers. When the buyers discovered the apartment could not be built with this feature, they sought to terminate the contract. The developer resisted the termination.

The court had to consider whether the promotional material was misleading, and what level of reliance the buyers could have reasonably placed on it given it contained a disclaimer and used phrases such as 'artist's impression' and 'indicative only'.

A key question for the court was whether the buyers would have entered into the contract to purchase the apartment had they not believed it could be constructed in line with the images they were shown.

WHAT DID WE LEARN?

Ultimately, the Court found in favour of the buyers, including:

- The representations in the promotional material were misleading and deceptive in circumstances where the developer knew the apartment could never look like the photos.
- The buyers relied on those representations. The developer's disclaimer was insufficient to save it from having engaged in misleading and deceptive conduct where the disclaimer was hidden in the brochure without any prominence in the marketing material.
- The real estate agent who brokered the sale did not engage in misleading and deceptive conduct as he was not aware of the advice from the architects.

The developer has appealed the decision.

Contact our lawyers to ensure your marketing materials are not misleading and deceptive or for more information.

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