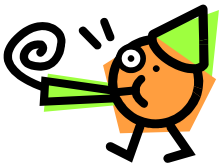
KR Hewlett & Co's
PROPERTY LAW NEWS and VIEWS –June 2009



An EXPENSIVE advertisement - misleading or deceptive property promotion held to account in the courts: A recent decision arose from advertisements in Mandarin language, placed by an estate agent, in Chinese publications circulating in Sydney.

The advertisements, in May 2003, promoted sale of *new units* in *a development area* "acclaimed by the *Sydney Morning Herald"* …"which is going *to double in 5 years*". The newspaper item being referred to however was a *Sun Herald* article, in February 2002, that had indicated that high rise residential development in the area, and the relatively higher prices being asked for those new units, would boost the value of *existing homes* in the *suburb overall*. A couple who had seen the ads took legal action.

That couple had bought a unit after seeing the ads. The particular unit, was purchased in 2003 "off the plan", to be paid for in about 2005, 2 years later. By that time, 2005, the market value had fallen considerably.

The real estate ads were found to have materially contributed to the purchaser's decision to buy a unit in the area from the agent, those purchasers apparently believing the unit would increase in value. While the particular agent who dealt with the purchaser did not repeat the agency advertisement claims, she was found not to have qualified the impression given by the ads, and to have possibly confirmed that impression by indicating how values of properties in the development had increased to that point.

In the case, both purchasers did not speak or read English well, had lived in Australia less than 6 years, were less than 30 years old and had non professional occupations. The contract was 330 pages long, special conditions 46 pages of that. The agent apparently chose, *and paid the fees of*, the purchaser's solicitor. The purchaser did not receive independent financial advice. The purchaser did not even have sufficient funds to pay all the deposit on time when it was due under the contract.

Although some evidence of the purchaser was not accepted by the court, and one of the purchasers admitted that nobody could guarantee whether property prices could go up or down, the purchaser nevertheless succeeded in court**.**

A Very Important Foyer, and a Very Important lease case: In a recent lease case, the High Court has taken a very strong view about *unauthorised renovation work* of a commercial tenant.

In about early 1997, a landlord had a new foyer built within their building that they wished to lease. The judgment indicates that the landlord "had taken particular care over and interest in the construction of the foyer. It was of high quality. ***It was made of special materials – San Francisco Green granite, Canberra York Grey granite, sequence-matched crown-cut American cherry.*"** The foyer may have been designed to appear grand - to be a leasing tool and have pulling power.

A large company tenant took a 10 year lease of the premises commencing 1st February 1997. Clause 2.13 of the lease stated that the tenant shall:

> "Not without the written approval of the Landlord first obtained (which consent shall not be unreasonably withheld or delayed) to make or permit to be made any substantial alteration or addition to the Demised Premises".

The Tenant also promised, by clause 2.10, to keep the premises in repair; by cl 2.11, to yield up the premises on the determination of the lease in good repair; and, by cl 2.12.4, to make good any breakage or damage.

In early July 1997, there must have been some discussion about possible renovation of the foyer. On Thursday 10 July 1997 a landlord's representative arranged for the tenant to be told that the landlord did *not* consent to any alteration to the foyer. Then, that landlord's representative informed the Tenant in writing on Friday 11 July 1997 that the Landlord could not consent until the Tenant's alteration proposal was examined at a site meeting at 11am Monday 14 July 1997.

The landlord's representative arrived at the premises at 10.45am on 14 July 1997 and "..found that the foyer ..had been badly damaged. A glass and stone partition, timber panelling and stone floor tiles had been removed. She was shocked and dismayed to see what remained of the floor stone work being *jack hammered*. A large bin was filled with the debris of the foyer". These changes had been carried out for the tenant.

The tenant stayed there and leased the premises for years after their alterations. The legal question then was what damages the landlord was entitled to, years later in about 2004, from the tenant due to its unauthorized renovation of the foyer. The trial judge found that by

the time the tenant was likely to finish their occupancy, in about 2012 or 2017, that the likely reduction in the value of the premises due to be changes in the foyer was about $34,000 and the landlord's damages were limited to this amount.

The full Federal Court on appeal however, took a different view, and awarded the landlord damages of *$1.38 million* mainly based on the costs of reinstating the foyer back to its original condition.

What did the High Court of Australia do? The High Court in effect agreed and decided that $1.38 million was the correct amount that the landlord should receive for the tenants breach.

The High Court of Australia appeared to imply that it took a dim view of what had been done. At paragraph 13 of the judgement they said:-

“Underlying the Tenant's submission that the appropriate measure of damages was the diminution in value…was an assumption that anyone who enters into a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid… It has been dignified as "the doctrine of efficient breach". It led, in the Landlord's submission, to an attempt "arrogantly [to] impose a form of 'economic rationalism'" on the unwilling Landlord. The assumption underlying the Tenant's submission takes no account of the existence of equitable remedies, like decrees of specific performance and injunction, which ensure or encourage the performance of contracts rather than the payment of damages for breach. It is an assumption which underrates the extent to which those remedies are available”

At paragraph 15 the court says “So here, the Landlord was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages is the loss sustained by the failure of the Tenant to perform that obligation; and that loss is the cost of restoring the premises to the condition in which they would have been if the obligation not been breached”.

The lesson for tenants – they should not carry out unauthorized renovations without prior approval of the landlord, in total disregard of the landlord. If they do, they could be liable for very large damages, even years later. Prior consent of authorities such as Council should be obtained, where required. If part of a strata complex, if common

property is affected, the prior consent of the owners corporation needs to be obtained and also a strata special resolution, license or exclusive use by-law to use common property.

There is a larger lesson from the case. Don't assume that a contract can be breached in total disregard to the other party's rights because the breach may not in your view lead to substantial loss for the innocent party. If the court could have ordered a halt to the breach if the innocent party had found out in time, the court may later award very substantial damages – here $1.38million instead of $34,000.

PARLIAMENTARY PROPERTY law changes: NSW Parliament is responding to concerns about fraud in mortgage and other property matters, and concerns about mortgagee sales. For example, new laws will require lenders to more clearly identify borrowers. There will be stricter obligations on persons acting as a witness in signing documents relating to property.

Finance providers exercising a power of sale over a property are to have a duty to take reasonable care to ensure that the property is sold for not less than its market value. There were previously some unwritten law protections, and we may need to wait for court interpretation to see what this parliamentary law adds to those protections. We will discuss the new laws in more detail in future newsletters.

STRATA LAWS

Improving air space law - changes to apartment strata title law last year: As you would likely be aware, most apartments in NSW are subject to strata title law. Last year, there were some important changes made to NSW strata and related legislation.

One change related to building law. In NSW, most parts of a strata building are common property. If there are defects in the building, it is usually in common property. In the past, there have been times when an owners corporation, a strata managing agent or a caretaker may have not acted on an owner's complaint about building defects. Now, the law has been made clear that *a lot owner* can directly make a complaint to the NSW Office of Fair Trading about a dispute about residential building work affecting common property in the owners corporation. There were other changes too, which we expect to include in a future newsletter.

STRATA TITLE - BREACH of Strata By-laws: By-laws for a strata scheme legally bind the Owners Corporation, the owners, any mortgagee or lessee or “occupier” (which means any person in lawful occupation) of a lot. There is also an *implied* covenant, in a *lease* of a lot or common property, by a lessee to comply with the by-laws.

By-laws do not however bind, nor can they be amended to bind, an invitee (like customer, client, patient etc), a visitor or others outside the strata scheme.

There is a standard by-law however that maybe breached if an owner or occupier permits their invitee or visitor to breach the by-law, or if the owner or occupier does not take reasonable steps to ensure that the invitee or visitor does not breach the by-law. In this way, the *owners or occupiers can* sometimes *be made responsible for the actions of people that they invite* on to common property.

If there is a breach of a by-law, if it is serious, or if the offender is a repeat offender, then often the best remedy is for the Owners Corporation to ask for an order from an "Adjudicator" seeking future compliance by the offender under section 138 of the relevant legislation. An Adjudicator can make an order for any person who is subject of an application to do, or refrain from doing, a specified act with respect to the strata scheme.

There are some difficulties and disadvantages in the following this process, and legal advice should be obtained before commencing the process.

One possible advantage of this process is the requirement of the parties to have mediation before the application for adjudication proceeds to a decision being made. If an agreement can be obtained at the mediation, that can be made an order of the Adjudicator.

If the Adjudicator makes an order by agreement or by decision, and there is a *further* breach, the Owners Corporation can go to the relevant tribunal for that further breach, and section 202 allows the tribunal to impose a penalty of up to **$5,500** for breach of an Adjudicator's order. Obviously, the amount of this penalty is a substantial disincentive for the alleged offender to breach the by-law again.

Depending on the facts of a particular breach, there are alternative remedies available to the Owners Corporation who should of course promptly obtain competent legal advice.

Strata title in the courts: In a recent strata case, the result depended upon whether a tile floor, and the waterproof membrane underneath it, at the base of an open terrace area in an apartment, was common property or part of a lot. If it was common property, the Owners Corporation would be responsible for its repair and maintenance.

The strata was a 6 floor residential building in the northern Sydney area. The dispute concerned an open terrace area which was part of the top storey of the building which was all one lot. The floor of the open terrace area consisted of tiles, with the waterproof membrane underneath. It seems that the waterproof membrane failed, and this led to entry of water into the interior of the unit. This meant that the occupant had to vacate the unit for 2 ½ years until the problem was eventually fixed.

The strata plan was registered in 1989. At the time *of registration* of the strata plan (when the building was newly built), the floor of the open terrace area consisted of concrete slab, covered by the waterproof membrane and the tiles which were the later source of the problem.

The registered strata plan did not itself, it was held, define what was the *lower* horizontal boundary of common property. So, the court held that *the legislative default position applied* - that the lower horizontal boundary was the *upper* surface of the floor *at the time the strata plan was registered*.

At the time the strata plan was registered, the upper surface of the floor of the open terrace area was the *upper surface of the floor tiles* of the terrace area. Therefore, the floor tiles of the terrace area and the waterproof membrane below them were part of common property and the Owners Corporation were liable for their repair and maintenance.

This case shows how important it is for strata purchasers, or developers, to carefully consider the definition of common property boundaries, especially for susceptible areas like uncovered terraces. The case also indicates the importance of lasting waterproofing.

Another recent strata decision makes it clear that, if you are going to have exclusive use of, for example, one particular lift amongst a few lifts in the building on the basis that you will be responsible for paying the expenses relating to that lift, you also need to make clear that you would be exempted from certain parts of the overall strata administrative levy relating to lift repair and maintenance costs, or you may end up also paying for repair and maintenance costs of lifts you do not use.

RECENT LITIGATION TRENDS in cases about real estate, commercial matters and loans:

In recent NSW court cases about property, recent *specific* problems have included the concerns for purchasers about "writs" on title - where a vendor may owe money to people, other than to the vendor's mortgagee.

On the other hand, there are concerns for vendors about the difficulty, where a purchaser has paid just 5% deposit, of the vendor being able to claim the balance of the usual 10% deposit in the event of default by the purchaser. If you are proposing to sell or purchase, these issues should be discussed with you.

Apart from specific problems, there are four *general* trends of note I have observed. The four *general* trends are:-

-  Some borrowers or guarantors being able to escape liability where a loan contract is found to be "*unjust*". This could clearly apply, for example, where a lender's broker has not been scrupulous in checking a borrower's capacity to pay, and the borrower or guarantor suffers from some special disadvantage – such as where the borrower suffers from intellectual impairment or perhaps due to a combination of old age, lack of education and understanding of English. Any borrower or guarantor who suffers from a bad loan, who believes that there may be some irregularity in the loan process or who is disadvantaged in any way might have remedies and should seek independent legal, and financial, advice.

- Finance providers sometimes finding that home mortgage documents cannot be enforced against a particular home owner mortgagor, whose identity has been assumed and signature has been forged (perhaps by the other mortgagor). Alternatively, the finance provider is otherwise unable to enforce the mortgage or other security due to a technical defect in the mortgage document which has been registered. This has been part of a trend of an increase in fraud in property transactions in my view. Proposed new parliamentary laws (please see article above), along with some recent measures, will hopefully reduce the incidence of property transaction fraud in future.

If a home owner has been a victim of fraud in relation to a mortgage however, they may well have a remedy. Lessons from the area could be to contact your finance provider or bank if you suspect your partner, relative or friend has or may try to deal fraudulently with your home and to keep your title deeds in safe custody with a bank or *reputable* law firm. If you are defrauded, see a good solicitor.

- A wide variety of aggrieved parties successfully claiming on the basis that another party in a transaction engaged in "misleading or deceptive conduct". This cause of action of "misleading or deceptive conduct" is probably the most *powerful* civil legal claim in our law at present in my view.

Misleading or deceptive conduct can include “half truths” or even remaining silent when there would be a reasonable expectation that a person’s misapprehension should be corrected.

This legal cause of action may apply to representations made by or on behalf of vendors in the sale of a residential *investment* property.

In the sale of a principal place of residence property, a similar (but not identical) law of misrepresentation will apply.

An interesting successful case of misleading or deceptive conduct is the subject of the first article in this newsletter.

Not all cases claiming misleading or deceptive conduct succeed. In a recent unsuccessful claim, *a real estate agent* for a vendor *passed on* to the purchaser’s representative *a comment by the vendor’s son* (which was false) that a certain named third party had offered to pay a higher price than the purchaser.

The purchaser then increased their offer due to this comment, purchased the property for the higher amount, later found out the comment was false and sued *the agent* for extra money paid due to the statement.

The court found that the agent had just passed on the comment of the vendor's son "for what it is worth" and the agent was not liable. The case shows how careful you should be, in negotiations, to listen or clarify comments.

- The increasing application of the doctrine of *equitable estoppel*. This principle may help a person who suffers loss, even where there is no legal contract. This legal doctrine may apply for example where:-

A party ("Enticing party") encourages another party ("Suffering party")…

So that the Suffering Party acts to their own *detriment* …

In the belief or assumption of Suffering Party that Suffering Party will receive a benefit from Enticing Party…

While Enticing Party is sitting by, knowing (or should be knowing) that Suffering Party is acting to their detriment…

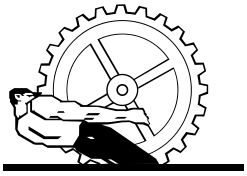
Even though there is at that time *no legal contract* or obligation between the parties.

This *equitable estoppel* is a legal principle that may assist a party who has suffered a detriment, when other legal principles fail when there is no legal contract. It is a legal principle of "**last resort**". *That the principle is seemingly being used more frequently is an indication that more matters are unfortunately proceeding <u>before</u> paperwork is finalised*.

A recent example of successful equitable estoppel claim involved a supermarket chain's proposed lease of a property that did not proceed. The supermarket chain failed to disclose its changed position in negotiations with a land owner, who was spending money to improve the site for the supermarket. The land owner was assisted by showing that the supermarket chain was estopped from denying his rights.

Another example was an electrical contractor who went to work for a mining company, after being led to believe by the miner that there was a binding work contract arrangement

although the formal contract had never been finalised. The electrical contractor succeeded in protecting his rights.



To try and establish equitable estoppel can be very costly, and it is quite risky. The main lesson from cases in this area are for potential contracting parties to get formalities right *before* commencing work, spending money, improving sites or otherwise acting in a detrimental way.

Concluding this article, these case trends indicate that it just as important as ever to obtain competent independent legal advice before entering into property, loan or commercial dealing transactions. Legal prevention is much better than attempted legal cure. Nevertheless, the principles set out above also indicate that a person left aggrieved by an unfortunate property, loan or commercial dealing transaction may sometimes have rights and remedies they did not expect.

With best regards to all, and I hope I'll see you soon somewhere….

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