

## What are real estate agents required to disclose to a buyer?

In this edition we pose the question: Where is the line drawn between the agent's responsibility to sell property on behalf of the seller and their obligations of disclosure to a buyer? As you might expect, the line can be blurred and is best approached by case examples. First, some basic principles:

- Under PAMDA real estate agents have statutory obligations of disclosure of interest to buyers (s138) and in respect of vacant land that cannot be lawfully used for residential purposes, the real estate agent is required to give the buyer a notice before the buyer signs the contract (s149). Where the seller has a statutory obligation to disclose certain matters, eg disclosures under the *Land Sales Act* and *BCCM Act* for "off the plan" sales and also with the recently introduced sustainability declarations, the legal relationship of agency between seller and agent can mean the seller is legally liable for the actions of its agent, but the agent should not be liable for the conduct of its principal (the seller).
- The *Trade Practices Act (Cth)* and *Fair Trading Act (Qld)* contain statutory prohibitions on misleading or deceptive conduct or conduct that is likely to mislead or deceive and the real estate industry code of practice prohibits fraudulent and misleading conduct.
- In *Zhang's* case the NSW Supreme Court decided an advertisement claiming that the value of a property would double in five years was found to have no reasonable *basis* and was deceptive and misleading.
- In *Xu's* case the NSW District Court proposed that using phrases such as "Cheap Price" can be said to be 'mere puffery' in which case it would not be misleading or deceptive conduct, but the court also made the helpful observation that misleading and deceptive conduct by the agent is not the only grounds on which an agent can be found liable to the buyer.
- In the Federal Court decision in *Mazzone* a real estate agent expressed an opinion of the value of a property to the buyer which was different to the bank's valuation. The court decided this was not a misrepresentation because the buyer had already made his own estimate and so the buyer had not relied on the agents representation as to value. The court also observed that if the agent's representation as to value had induced the buyer to enter into a contract and the representation was false or misleading, then there would be a case for misrepresentation.
- Even if an agent merely passes on information provided by the seller, the agent may not escape liability: *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*.
- From the case of *Butcher v Lachlan Elder Realty Pt Ltd* it can be observed that a properly drafted disclaimer of liability in a sales brochure may offer sufficient protection for a real estate agent to escape liability for the representations in the brochure. In that case the court offered the statement of legal principle that when deciding whether an agent has engaged in misleading or deceptive conduct or conduct that is likely to mislead or deceive, that conduct must be viewed as a whole, according to its effect or likely effect or impact on the person to whom it is directed.
- It is also a difficult question whether an omission about a particular quality or aspect of the property is a misrepresentation? Non-disclosure amounting to misrepresentation is a more complex matter. The outcome of a case largely depends upon the material facts such as whether the buyer asked about the issue and whether the agent's conduct misleads or is likely to mislead the buyer and/or induces the buyer to sign the contract.
- In the case of *Hinton & Ors v Commissioner for Fair Trading* a real estate agent attempted to conceal the fact that a property for sale was the site of a triple homicide. When the buyers found out they sought to be released from the contract. The court decided that the agent had concealed a material fact and this amounted to misleading and deceptive conduct under the *Fair Trading Act*. Also, the agents and the real estate business were fined.
- But in the decision of the Queensland Supreme Court in *Dovaeda v Pagliari* the buyers refused to complete their sale contract when they discovered construction work had commenced on a neighbouring property to build an indoor entertainment area. The court accepted the evidence of the real estate agents that they were not aware of the building work which was occurring on the neighbouring land at the time the contract was entered into and during negotiations with the buyers. In that case the buyers were found to be in breach and the agents were exonerated, but the decision may have been different if the agents were proven to have been aware of those relevant matters.

In conclusion, real estate agents should be mindful that although their first duty is to the seller and not the buyer, material omissions or non-disclosure to buyers can give the buyers rights against the agent and seller.

## Feedback

Kelly Conveyancing is the residential conveyancing division of Kelly Legal. If you have any feedback on this summer edition of Kelly Conveyancing's newsletter 'Clear Title' or if you have suggestions for topics in upcoming editions you are invited to contact the Manager of Kelly Conveyancing, Jessica Brake on ph: 07 4911 0555.

