VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP769/2016

CATCHWORDS

Australian Consumer Law; misleading and deceptive conduct; claim that applicant paid too much for property dismissed; claim for extra building costs arising from slope of the land dismissed; claim for delay in settlement of property dismissed; claim for delay in building works dismissed.

FIRST APPLICANT	Mr Ibrahim Diankha
SECOND APPLICANT	Ms Claudia Chialastri
RESPONDENT	RCL Grandvue Pty Ltd (ACN 164 331 702)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	22 August 2017
DATE OF ORDER	22 August 2017
DATE OF REASONS	12 September 2017
CITATION	Diankha v RCL Grandvue Pty Ltd (Building and Property) [2017] VCAT 1444

REASONS

INTRODUCTION

1 At the conclusion of the hearing on 22 August 2017, for the reasons given orally at the hearing, I dismissed the claim of the applicants.

2 On 29 August 2017, that is to say within the 14 day time limit created by s117 (2) of the *Victorian Civil and Administrative Tribunal Act 1998* ("the VCAT Act"), Mr Ibrahim Diankha and Ms Claudia Chialastri, the applicants, requested that the Tribunal give written reasons.

3 I now set out in writing my reasons for the decision made on 22 August 2017. The reasons are based on the transcript of the oral reasons I delivered the end of the hearing. They have been edited in the interests of readability, but not substantively. The contents of some exhibits, which were only briefly referred to at the hearing because the parties were familiar with

them, are in some instances expanded upon in order to provide context for these written reasons.

BACKGROUND TO THE PROCEEDING

4 Mr Ibrahim Diankha and Ms Claudia Chialastri ("the owners") purchased an allotment in Eastbourne Crescent, Officer ("the property") on 31 May 2015. [The precise address has been omitted in the interests of the owners' privacy] The purchase was from RCL Grandvue Pty Ltd (ACN 164 331 702) ("the developer"). They paid $230,000. They have come to the Tribunal seeking damages on the basis that they were misled when they purchased the property.

5 At the hearing, Mr Diankha appeared on his own behalf and on behalf of Ms Chialastri, who he explained was his wife. She was not present, and Mr Diankha was the only witness for the owners. The developer was represented by a director, Mr David Wightman. He and Mr David Finney gave evidence of behalf of the developer.

6 The primary basis of the owners' case is that when they inspected the property they thought it was essentially flat. After they had settled the purchase, the builder they engaged to construct a house on the property advised them that it had a substantial slope and that he would not be able to build the house on a slab, but would have to build on stumps. The builder in June 2016, quoted $15,000 to make this change. In addition, the owners say they will have to put in a two metre staircase from the alfresco area to the ground. They assert that these and other changes have meant that there is an increase in building costs $65,000.

6 The owners also say that they paid too much for the property. The basis of this claim is that when they made a complaint about this to the vendor, their conveyancer was told by the vendor's lawyer that "the slope of the property was reflected in the sale price". They say this was not mentioned by the selling agent, nor was it mentioned in the contract of sale. The applicants rely on the advice of Mr Diankha received from an unnamed expert to the effect that the property is not worth $230,000.

7 The owners also make two claims for losses arising out of delay. First, they say that they suffered loss because the developer did not settle the sale of the property three months after the sale, which was the date they expected because a representation of this effect had been made on a plan of the property presented by the selling agent. Secondly, they say that the builder's work has been delayed because of the slope on the property and the need for extra works, and that the completion of their house has been delayed by at least five months. In connection with this claim they rely on a commencement notice from the builder which indicated that work began on "10 October 2016" and was to be completed by "May 2016." Clearly this is an error and the reference to May 2017 must have been intended. They seek

$15,000 for extended holding costs, including mortgage payments and council rates.

8 I now consider these claims in turn.

THE CLAIM FOR A REFUND OF $20,000 OF THE PURCHASE PRICE ON THE BASIS THAT THE OWNERS PAID TOO MUCH FOR THE PROPERTY

9 The first point to be made is that it is hard to understand the legal basis for this claim. The owners had inspected the property some weeks before signing the contract of sale on 31 May 2015. This is established by the fact that their designer Kevin Hogan (of the builder, Green Design Homes Pty Ltd) had prepared a design for a house to be built on the specific allotment the owners were considering buying as early as April 2015. This tells me that the owners had been looking at the site with Mr Hogan as early as that time. When they decided to purchase the property, they asked the agent to provide a price. On 20 May 2015 the agent, Daniel Leser, sent an email indicating the price was $230,000, "with a deposit today". Trust account details were provided. No evidence was given as to whether a deposit was paid on that day, but in any event a contract showing the purchase price of $230,000, with a deposit payable $11,500, was signed by the owners on 31 May 2015, that is, eleven days after the purchase price was advised.

10 The upshot is that the owners purchased the property after having had an opportunity to consider the purchase price and the property for some time. The contract signed on 31 August 2015 contained the purchase price they were quoted on 20 May 2015 There was no suggestion that they were rushed into the purchase, or agreed to the price under pressure. In the absence of any evidence of any loss in some way arising from any duress, or misleading and deceptive conduct on the part of the developer, it is hard to see how the fact that the owners paid the agreed price of $230,000 for the property, can be actionable.

11 As indicated above, it appears that the owners gained the perception that they should be entitled to a refund because of the slope of the property, which became apparent after they had purchased it. In this connection they refer to a statement attributed to Lucy Gulli, of the developer's lawyers, in April 2016 that "the slope of the property was reflected in the sale price".

12 When Mr Whiteman and Mr Finney gave evidence on behalf of the developer, they referred to a flat allotment across the street from the property at Lot 233, which attracted a price of $225,000 even though it was a small block of only 411 m². On the other side of the coin, they referred to allotment 129, which was a large allotment of 817 m², but was steep. This attracted a price of $240,000. Accordingly, they satisfied me that there was a relationship between price and the flatness of the property.

13 In terms of relative sales, they drew my attention to sales of lots 125, 126, and 127 Eastbourne Crescent, which were the contiguous allotments to the owners land. Lot 125 was 534 m² and sold for $230,000. Lot 126 was

smaller at 525 m², and still sold for $225,000. Lot 127 was even smaller at 516 m², and sold for $223,000. The property the owners bought is larger than each of these allotments but sold for $230,000. On the basis of this evidence, I think the developer has demonstrated, if it was necessary for the developer to do so, that $230,000 was a reasonable price for the property.

14 However, as I say, the owners did not demonstrate any misleading or deceptive conduct, or duress, or unconscionable conduct on behalf of the owners. So in any event, the price of the land did not generate a cause of action. I dismiss this limb of the claim.

EXTRA BUILDING COSTS

15 To make out this part of their claim, the owners had to demonstrate two things. The first was that they had been misled or deceived when they signed the contract. The second was they would have to show that they had incurred extra building costs by reason of the developer's misleading or deceptive conduct.

16 Mr Diankha gave evidence that he and Ms Chialastri signed the contract on 31 May 2015 without reading it in detail. When he was asked whether he had consulted a lawyer before signing, he said no, and that he was entitled to rely on what he had been told.

17 When it is pointed out by the developer that the contract contains a three day cooling off period, Mr Diankha acknowledged this. He then conceded that he had not read the contract in detail during those three days, nor did he seek legal advice in respect of it.

18 The developer pointed out that the fact that the property was part of a subdivision and that subdivisional works would be carried out, was expressly stated in clause 16 of the contract. In particular, the developer referred to in clause 16.2, which provided:

> The Purchaser acknowledges that the Property has been, or is, or will be, in the course of subdivisional works and may be filled, raised, levelled, packed or cut as disclosed in the Vendors Statement ("subdivisional works").

19 The developer also relied on clause 16.1 which provided:

> The Purchaser acknowledges that the Property may have been filled, raised, levelled, compacted or cut prior to the Vendor becoming a registered proprietor of that part of the Development Land containing the Property and that the Purchaser must not make any requisition, nor claim any compensation, nor claim any set off, nor rescind this Contract for any such works.

The developer relies on 16.1 as being effective to deny the owners' claim for compensation arising out of the filling, raising, levelling, cutting and packing of the land.

The engineering drawing

20 It follows from 16.2 that the subdivisional works on the land have to be as set out in the vendor's statement. The developer in the course of the hearing referred to the extensive s 32 statement (given under s 32 of the *Sale of Land Act 1962*) which was included in the contract of the sale of property. The s 32 statement included a reference to a plan setting out the engineering works to be carried out. This was the Road and Drainage Functional Layout Plan drawing number 2128/10B/F 1 D ("the engineering drawing").

21 The developer said the engineering drawing was critical, because it established the data points on the property prior to the subdivisional works when it was just a paddock. In particular, it showed that the property sloped from 43.64m at the front to 40.73m of the back, i.e. 2.9m drop across the block. The developer also said that the finished surfaces were also shown on the plan. In the south-east corner the finished surface was to be 45.22m and in the south-west corner it was to be 42.85m. In the north-west corner it was to be 40.87m and in the north-east corner it was to be 40.90m. On this basis it was clear that the works were to accentuate the slope on the property.

22 The significance of this set of figures, according to the developer, was that they are reflected in the builder's own plan for the house which was contained in the building contract signed in August 2015. The builder's plan demonstrates that the builder understood from the contact of sale what the layout of the property was.

23 I find that the contract of sale was not misleading. The owners got what they had contracted for. They may have relied on their perception of the site at the time they inspected it, but the engineering drawing, which showed the pre-existing contours of the property, demonstrates that the property did have a slope even before the engineering works for the road on the upper side were carried out. Accordingly this claim for misleading and deceptive conduct fails.

Finding regarding claim for consequential building costs

24 As the developer did not mislead or deceive the owners in the purchase of the property, the consequential claim for building costs incurred in order to deal with the slope of the property must also fail. I find the consequential costs are not recoverable from the developer.

25 Having made that point, I comment that some of the claims made by the owners for extra costs would have partly failed in any event.

The builder's letter of 14 July 2017

26 The extra building costs are set out in a letter of 14 July 2017 from the builder appointed by the owners, Green Design Homes Pty Ltd. The first item is the construction of the 2m steps from the alfresco area to the ground. This letter provided a quotation in respect of the steps $9,970 inclusive of

GST. Clearly the construction of the steps is something which is specifically related to the existence of the slope on the property. If the claim for misleading and deceptive conduct on the part of the developer had been made out, then something for the construction of the steps would have been allowed.

27 There was also a quotation in the letter for tiling of the alfresco area of $5,200 inclusive of GST. I consider tiling to the alfresco falls into a different category. The alfresco had to have a surface, whether it was at ground-level or 2 m off the ground. It is unclear why the developer would be expected to pay for the surface treatment of that alfresco area.

28 There is a third claim relating to the alfresco area, namely the construction of a glass balustrade for $5,930 inclusive of GST. This issue is more complex. Presumably the alfresco area would not have needed a boundary wall if it had been at ground level. If in fact that developer had been responsible for the cost of extra works arising from the slope of the land, then allowance would have had to be made for a balustrade on the balcony area to make the alfresco safe for the occupants. However, I do not have to make a finding of quantum of that work in the circumstances.

29 The claim for the construction of a retaining wall for $6,750 inclusive of GST would have failed in any event, because a retaining wall was allowed for in the building contract as a provisional sum. Indeed the provisional sum in the contract of almost $8,000 was higher than the amount claimed by the builder in the letter of 14 July 2017.

30 In the letter of 14 July 2017 the builder also claimed $1,350 inclusive of GST, in respect of the cost of the construction of drainage pits. As the developer pointed out, what was required for site drainage would depend in part on the landscaping treatment of the site. It was not demonstrated that the pits would not have been required in any event.

31 Another cost claimed by the owners was concreting underneath the house. The quotation put forward was from Arif Concreting and was dated 24 June 2017. The amount quoted was $29,875 inclusive of GST. As the developer pointed out, to place the concrete under the house was an option for the owner. This was not work driven by the slope issue. Accordingly this claim would have failed in any event.

32 One final point to be made about construction costs is that the evidence was that the building contract sum was $320,000 approximately. The evidence of Mr Diankha was that the contract sum was what was being charged, other than variations, and so there was no adjustment to the base cost of the works to allow for the erection of the house on stumps. Although the builder has said this was going to be $15,000 extra, in the event the extra costs had not eventuated.

DELAY IN SETTLEMENT

33 The first claim for delay was in the completion of the settlement of the property. This was based on an alleged representation made by the agent, apparently on a diagram of the land which indicated when this particular lot would be sold. The owners say the developer breached the expectation that the property would be settled within 3 months. The claim fails for lack of evidence. The particular piece of paper upon which the agent had allegedly written a settlement completion date for the property was not put into evidence.

34 In any event, any such representation was not consistent with the contract, which stated that the developer had 24 months in order to settle the sale of the property. The developer referred to clause 14.1 of the contract, which gave either party a right to rescind if the plan of subdivision was not registered within 24 months after the date of sale.

Finding as to claim that contract for sale settled late

35 I agree with the developer that clause 14.1 of the contract governs the situation, and on the basis that the evidence shows that settlement occurred in April 2016, I find the developer settled within time.

DELAY TO BUILDER'S PROGRAM

36 The second delay claim was that the builder's work had been delayed because of the need for extra works arising from the slope on the property. The contention was that the completion of the house has been delayed by at least five months as the builder had said the work was to be completed by May 2017, and it would not now be completed until October 2017. As noted, the owners relied on a commencement notice from the builder confirming the building works began on 10 October 2016 and would be finished in May. I comment that this is a seven-month completion period, which is at odds with the 240 day (eight-month) completion period initially stated in the contract.

37 I consider this particular delay claim is contingent upon delay arising by reason of some act or omission on the part of the developer. There was a dearth of evidence about that. There was evidence about a delay by an adjoining owner agreeing to an increase to the height of the garage, which is said to have delayed the works. I am not satisfied that this particular delay was solely responsible for the delay in building the house.

Finding as to delay in builder's program

38 In the circumstances I am not satisfied that a delay claim based solely on the acts or omissions of the developer has been made out. Before the works started the builder acknowledged that there may have been an inadequate allowance for wet weather. All other competing or concurrent forms of delay have to be taken into account. The proof of an extension of time claim such as this is complex. On the basis of the evidence at hand, and on the

basis that the builder actually understood the problems with the site at the outset and should have provided a realistic timeframe, I find the owners cannot look to the developer for compensation for delays in the completion of the building works. This limb of the claim also fails.

CONCLUSION

39 As each of the claims made by the owners has failed, their application must be dismissed.

C Edquist
Member