

REAL ESTATE AGENTS BEWARE!!!

A recent case in the Qld Supreme Court has determined that a real estate agent was liable for statements made to a purchaser¹. The statements made included both verbal and written representations by the selling agent prior to a contract of sale being signed. The relevant property was a commercial property on the Gold Coast with various tenancies, and the selling agent was a real estate agent with 20 years' experience employed by Ray White Commercial, an agency with established history and experience and one of the leading commercial real estate agents on the Gold Coast. Currently, the case is on appeal, however at present it serves as a warning to all selling agents.



The property in question was the Piazza Shopping Centre at Varsity Lakes, Queensland. What was critical in this case, was the information contained in the Information Memorandum ('IM') given to the purchaser by Ray White, in addition to a number of other representations made to the purchaser concerning the yield of the property. These representations were

made verbally and by email correspondence. In the words of Justice Dalton, the agent was "*central to this case*". Even though there was a formal disclaimer included in the IM, this held little weight for the court at the end of the day given the representations made by this particular selling agent, and the fact that the IM contained no information as to the poor performance of the Centre as against the budget. This was later revealed in the management reports and owners statements since the centre was opened in 2009.

The specific case against Ray White Commercial succeeded due to a combination of important factors, including:

- Verbal representations made to the purchaser by the selling agent which were shown to be an exaggeration of the "net revenue" of the property.
- The exercise of calculating the supposed yield of the property (somewhere between 8-10%) by the agent and representing this to the purchaser.
- The information given to the purchaser by the selling agent was not based on information from the vendor.
- The IM was prepared by the selling agent and the front page displayed the name of the selling agent

¹ *Makings Custodian Pty Ltd & Anor v CBRE (c) Pty Ltd & Ors* [2017] QSC 80.

concerned, and a large “Ray White Commercial” banner with its address and contact details. It was branded on every subsequent page of the IM with the logo “Ray White Commercial”. The court found that given the agent had considerable experience in commercial real estate, it was putting forward the information in the IM **as its own**.

- The IM included a tenancy schedule as Annexure A, and a *Retail Shop Leases Act* notice to tenants of the annual estimate of outgoings for the financial year 2008/2009, as Annexure B. Even though it was understood by the purchaser that Annexure B was compiled by CBRE the managing agent as it showed their logo, the purchaser thought that both Annexures A and B were provided by Ray White because they bore the “Ray White Commercial” logo on them in larger print than CBRE’s logo, and had **verified and endorsed** the information presented.
- The selling agent’s conduct in representing and discussing the content of Annexures A and B to the purchaser direct.
- The court’s view that the purchaser did rely upon the information and statements by the selling agent ‘*very trustingly*’.

- Had the purchaser known the truth about the centre’s financial performance **he would not have purchased the centre**.

“Sources of information” – a reasonable alert to purchasers – buyer beware?

In addition to the above, the court made an interesting comment concerning a paragraph entitled, ‘Sources of Information’ in the IM. The paragraph stated that, “...*the information supplied in the IM had been provided by the vendor, and that the agent had not independently checked the information merely passed it on*”. It also advised prospective purchasers to rely upon their own enquiries and that the agent made, “...*no comment on, and gave no warranty, as to, the accuracy of the information*”. The purchaser stated that he did not see these paragraphs.

These paragraphs in the IM, together with the disclaimer, were found at the end of the document, which the court stated were not effective to alert a reasonable purchaser that the information in the IM was merely being passed on by the vendors, particularly given the branding of Ray White Commercial that occurred throughout the IM.

Further, that the disclaimer contained within the IM was not sufficient to erase the effect of the agent’s representations made. Ultimately, the court found that the representations made by the selling agent were false and were part of a “*misleading course of conduct*”.

Damages were awarded against Ray White Commercial in excess of \$1.6Mill.

The claim made against CBRE the property manager was unsuccessful, as was the claim made by the agent to apportion liability against the vendor company.

What does this mean for selling agents?

The case is currently on appeal and we will continue to monitor its outcome. However, in the interim, this case serves as a warning to selling agents, that they can be held liable to a purchaser where they prepare a brochure like an IM, if it is found to be inaccurate, notwithstanding that the IM contains a disclaimer or a clause which identifies the source of the information.

What is obvious from this case, in particular, is that in determining whether an agent is found to be liable for misleading and deceptive conduct against a purchaser, the court will look at the extent to which an agent **prepared, adopted and/or endorsed** the relevant information given.

Careful consideration needs to be given in the future by selling agents when marketing and selling property for vendors, particularly commercial property with multiple tenants.

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