

## Article Information

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## Circumstances in which a real estate agent may be liable for misrepresentations to a purchaser

**The decision of the Supreme Court of Queensland in Makings Custodian Pty Ltd & Anor v CBRE (C) Pty Ltd & Ors [2017] QSC 80 relates to a dispute concerning the sale of a shopping centre.**

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*The decision of the Supreme Court of Queensland in Makings Custodian Pty Ltd & Anor v CBRE (C) Pty Ltd & Ors [2017] QSC 80 relates to a dispute concerning the sale of a shopping centre. The decision is relevant to real estate agents, vendors and property managers and provides authoritative commentary as to the limited effectiveness of disclaimers in erasing the effect of the representations which are later found to be incorrect. **Senior Associate, Adam Rinaldi** discusses.*

### The Facts

The dispute related to the sale of a shopping centre in Varsity Lakes, Queensland. The shopping centre was developed by Market Square No. 1 Pty Ltd (**Vendor**). The Vendor instructed Ray White to sell the centre. The Vendor had engaged CBRE to manage the centre.

Makings Custodian Pty Ltd (the purchaser of the centre and custodian of a superannuation fund) and Makings Pty Ltd (the trustee of the superannuation fund) (collectively, **Purchaser**) purchased the centre and alleged that Ray White and CBRE misled the Purchaser about the financial performance and value of the centre. No claims were brought against the Vendor as the Vendor was in liquidation.

The Purchaser was a self-managed super fund controlled by Mr Brian Makings. David Djurovitch, an agent engaged by Ray White, undertook the marketing campaign.

Mr Makings asked Mr Djurovitch whether he had any properties listed for sale which would return 8-10%. Mr Djurovitch then provided an e-brochure on 18 August 2009 from Ray White which listed the centre for sale and advised Mr Makings that he believed the centre would “produce a yield of between 8-10%”. Mr Djurovitch sent several emails to Mr Makings containing information in relation to the centre including the provision of an Information Memorandum (**IM**).

The IM contained information in relation to the net rental for the centre, the annual rent payable pursuant to the leases and an annual estimate of outgoings for the centre for the financial year ending 30 June 2009. The IM contained no information as to the poor performance of the centre as against the budget. Information produced by CBRE in its June 2009 Management Report showed that net income for that financial year was \$297,896 against a budgeted \$501,507 and that the centre was performing poorly as at June 2009 and that its financial performance had never been good.

Mr Djurovitch also made verbal representations during the sale and marketing process.

Mr Makings had made it known to the Mr Djurovitch that the Purchaser wanted to achieve a 9% yield. Mr Djurovitch then said that the purchase price applying a 9% yield would be \$6.9m. Mr Makings agreed with this calculation and a sale contract for this price was then executed. The sale contract contained no due diligence clause and was unconditional.

### Misrepresentations

The Court found that Ray White had misrepresented the Purchaser by:

- Mr Djurovitch stating the centre could be purchased for a price which would produce a yield of between 8-10%;
- preparing the IM which showed total net rent of \$607,175.04 had been received in the year ending 2009 (where the actual amount was \$297,896.00) and that all outgoings for the 2009 financial year for the centre were in the vicinity of \$106,140 and at a rate of about \$75-\$80m2 (where total outgoings were about \$190,000 (which equated to a rate in the vicinity of \$115m2) and not all were recovered from tenants);
- Mr Djurovitch stating that the “net rent” figures in the IM and tenancy schedules were actual income net of all expenses;
- Mr Djurovitch stating that since June 2009 actual net rent had risen to \$619,630; and
- Mr Djurovitch stating that apart from land tax, all the outgoings of the centre, including under the Building Management Statement, were billed to, and recovered from, tenants (where an amount of \$41,638 relating to costs associated with the Building Management Statement were not recoverable by the Vendor from tenants of the centre).

The Court found that Ray White was taken to have made the representations in the IM and other information provided to the Purchaser itself rather than simply passing on information from the Vendor to the Purchaser without any representation to its truth or falsity. The Court placed emphasis on the following in making this determination:

- Mr Djurovitch made several statements that went beyond the information in the IM and other information provided to the Purchaser and amplified the information that was in them. Specifically, Mr Djurovitch represented that the “net rent” figures in the IM and tenancy schedules were actual income net of all expenses received and that the tenants paid all the centre’s expenses as outgoings;
- in assisting the Purchaser to calculate a purchase price based on yield, Mr Djurovitch endorsed the net rent as an accurate actual figure for that purpose;
- the IM stated on the front page that it was prepared by Mr Djurovitch and displayed a large “Ray White Commercial” banner with address and contact details and the IM was branded on every subsequent page with the “Ray White” logo - this was treated by the Court as the agent putting forward the information as its own;
- although CBRE’s logo appeared on one of the documents issued to the Purchaser, Ray White’s logo appeared in much larger font which was an indication that the information was endorsed by Ray White;
- Ray White was one of the leading commercial real estate agents on the Gold Coast; and
- in assisting the Purchaser to calculate a purchase price based on yield, Mr Djurovitch endorsed the net rent as an accurate actual figure for that purpose.

The Court was satisfied that the analysis the Purchaser had made was one which relied upon information provided to the Purchaser and in particular the representations which were made by Mr Djurovitch. Specifically, Mr Makings was primarily interested in the income of the centre net of expenses and once Mr Makings was told that the tenants paid all the centre’s expenses as outgoings, his analysis focussed on net income and the relationship between the figure and the amount the purchaser was prepared to pay for the centre (yield). The Court held that had Ray White not made the representations it did, the Purchaser would not have entered into the transaction to buy the centre and it was the reliance on these representations which caused the loss.

The Court held that the centre was valued as at the date of settlement of the contract in September 2009 at \$4.91 million yielding a loss of \$1.99 million. Judgment was awarded in favour of the Purchaser for approximately \$1.6m.

## **Disclaimers**

The IM contained disclaimers and qualifications which stipulated that:

- all information in the document, and given orally, was given without responsibility;
- intending purchasers should not rely on the information but satisfy themselves as to it and as to any conclusions;
- Ray White gave no implied or express representation, warranty or undertaking as to the truth, accuracy, relevance or completeness of the information supplied;
- the information supplied in the IM had been provided by the Vendor, and that Ray White had not independently checked the information, merely passed it on; and
- prospective purchasers must rely upon their own enquiries.

The disclaimers and qualifications were located at the end of the IM which was a long and detailed document. The Court found that the clauses were not effective to alert a reasonable person in the Purchaser’s position that the information in the IM was merely being passed on from the Vendor without any belief in its truth or falsity. This was particularly the case where Ray White Commercial branding appeared very prominently and repeatedly in the IM. In addition, Mr Djurovitch’s verbal representations endorsed crucial parts of the IM. In the circumstances, the disclaimer was insufficient in erasing the effect of the representations made by Ray White.

**Defence of Contributory Negligence**

Ray White argued that any loss or damage suffered by the Purchaser was caused or contributed by the Purchaser's own failure to take reasonable care. The defence failed on a technical point because Ray White had not proved on the balance of probabilities that further enquiries made by the Purchaser would have made a difference.

**Proportionate Liability**

Ray White also sought to rely upon statutory provisions in order to apportion its liability against CBRE and the directors of the Vendor. However, the claims failed on the basis that CBRE and the directors of the Vendor were not found liable to the Purchaser.

**Application**

The case emphasises that agents can be found liable to purchasers if brochures, information, marketing and promotional materials are not accurate and that disclaimers may be ineffective in erasing the effect of the representations which are later found to be incorrect. In determining the extent of an agent's culpability to any misleading or incorrect statement which induces a purchaser to enter into a sale contract and causes loss, a court will consider the extent to which the agent prepared, adopted or endorsed the relevant information having regard to conduct and statements made by the agent.