Supreme Court

New South Wales

Case Name:	Smogurzewski v AIT Investment Group Pty Ltd
Medium Neutral Citation:	[2020] NSWSC 490
Hearing Date(s):	1 April 2020
Date of Orders:	5 May 2020
Decision Date:	5 May 2020
Jurisdiction:	Equity
Before:	Darke J
Decision:	Plaintiff not entitled to rescind contract. Contract remains on foot. No order to be made for return of deposit.
Catchwords:	LAND LAW – conveyancing – contract for sale – off-the-plan purchase – purchase of home unit and carspace – where home unit constructed as an adaptable unit and carspace marked with symbol for disabled persons access – purchaser rescinds contract under rule in Flight v Booth – whether presence of symbol means that owner would not have exclusive use of carspace or gave rise to risk of unauthorised use – held that owner would have exclusive right to possess and enjoy carspace – held that owner would have right to remove or conceal the symbol – purchaser not entitled to rescind contract – contract remains on foot – no warrant for deposit to be returned to purchaser MISLEADING OR DECEPTIVE CONDUCT – off-the-plan purchase of home unit and carspace – purchaser not informed that unit would be constructed as an adaptable unit and that carspace would be marked with symbol for disabled persons access – not shown that at time of contract vendor had that intention – no false or

	misleading representations made by vendor – conduct of vendor not misleading or deceptive or likely to mislead or deceive
Legislation Cited:	Australian Consumer Law, ss 18 and 30 Conveyancing Act 1919 (NSW), s 55(2A) Environmental Planning and Assessment Act 1979 (NSW), s 149 Local Government Act 1993 (NSW), s 650A Real Property Act 1900 (NSW) Strata Schemes Management Act 2015 (NSW), s 271
Cases Cited:	Brien v Dwyer (1978) 141 CLR 378 Flight v Booth (1834) 1 Bing NC 370 Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357; [2010] HCA 31 Victorsen v Easy Living Holdings Pty Ltd [2019] NSWSC 1721
Category:	Principal judgment
Parties:	Adam Josef Smogurzewski (Plaintiff) AIT Investment Group Pty Ltd (Defendant)
Representation:	Counsel: Mr S A Wells (Plaintiff) Mr P Folino-Gallo (Defendant) Solicitors: Rosier Partners Lawyers (Plaintiff) Fortis Law Group (Defendant)
File Number(s):	2019/146900
Publication Restriction:	None

JUDGMENT

Introduction

1 These proceedings concern a contract for the sale of land dated 22 August 2015 entered into by the plaintiff as purchaser and the defendant as vendor. The contract was an off-the-plan purchase of a proposed lot in a strata plan. The lot was to consist of a home unit and carspace.

2 The principal issue is whether the plaintiff's rescission of the contract on 22 March 2019 was valid and effective. By his Points of Claim, the plaintiff seeks a declaration that the contract was validly rescinded by him on that day. The plaintiff further seeks an order that the $72,000 deposit he paid be returned, together with all interest earned on the deposit. The plaintiff alleges that he had a right to rescind based upon the principle enunciated in *Flight v Booth* (1834) 1 Bing NC 370. In brief, the plaintiff contends that the presence of the International Symbol of Access ("the ISA") that was painted upon the carspace, which symbol the defendant was unwilling to remove, constituted a substantial and material departure for what was promised under the contract. It is common ground that the ISA is a symbol widely used to identify a carspace or other facility that is intended for use by persons with a disability.

3 The plaintiff also makes claims in the alternative to his primary rescission claim. In particular, he seeks an order under s 237 of the *Australian Consumer Law* that the contract be declared void *ab initio*, and consequential orders for the return of the deposit together with interest. This claim rests upon allegations that the defendant contravened ss 18 and 30 of the *Australian Consumer Law* by making false representations and remaining silent about the subject matter of the contract, in particular the nature of the carspace to be provided. The plaintiff also seeks an order for the return of the deposit pursuant to s 55(2A) of the *Conveyancing Act 1919* (NSW).

4 The defendant denies that the rescission of the contract was valid, and denies that the plaintiff is entitled to any of the relief he seeks. However, the defendant has not sought to terminate the contract and forfeit the deposit. The defendant is treating the contract as remaining on foot.

Summary of salient facts

5 The contract was entered into on 22 August 2015. It took the form of the Law Society/Real Estate Institute standard form (2005 Edition), as amended and supplemented by a number of special conditions.

6 The land the subject of the contract is described as "Unit 7.01, Kingston Quarter, Shepherds Bay, 22-36 Nancarrow Avenue, Meadowbank" and "Lot 107 in an unregistered Strata Plan…". The improvements are noted as a home

unit and a carspace. The purchase price was $720,000, with a deposit of $72,000. The plaintiff paid a holding deposit of $5,000 upon exchange. The balance of the deposit was paid on 7 September 2015. Payment of the deposit in that manner was in accordance with Special Condition 61.2. The deposit is held by the vendor's solicitor named on the front page of the contract.

7 By Special Condition 38, the completion date was to be the later of 42 days after the date of the contract, 14 days after notification to the purchaser of registration of the Strata Plan, and 14 days after the vendor gives a copy of the Occupation Certificate to the purchaser. As matters turned out, the Occupation Certificate in respect of the relevant building was given to the plaintiff's solicitor on 7 January 2019. The Strata Plan (SP98937) was not registered until 25 January 2019. Notification of the registration was given to the plaintiff's solicitor on 7 February 2019.

8 Special Condition 58 concerns car parking. It provides:

> 58. Car Parking
>
> This clause 58 applies if this Contract indicates that the sale includes a car space (final car space).
>
> 58.1 Construction of Car Spaces
>
> The vendor discloses and the purchaser acknowledges that it is the vendor's intention to construct car parking in the building. The purchaser acknowledges and agrees that:
>
> (a) the vendor may allocate the position of the final car space to another part of the building or the Site at the vendor's absolute discretion;
>
> (b) the final car space may be either on title and form part of the property or a separate lot in another strata plan in the Site;
>
> (c) if the final car space is a separate lot in another strata plan in the Site, the use of that lot may be subject to restrictions on use or by laws as required or imposed by the relevant consent authority.
>
> For the avoidance of doubt, it is agreed that the purchaser is not obliged to complete the purchase unless the final car space is included in the transfer.
>
> 58.2 No claims
>
> The purchaser will not make any claim, delay completion, objection or requisition, rescind or terminate this contract in respect of the final car space (including but not limited to, the size and location of the car space).

9 Special Condition 52 provides:

> 52. Rescission

> 52.1 Time limit
>
> The purchaser must exercise any right to rescind this contract within 14 calendar days of the purchaser being notified of a matter that gives the purchaser the right to rescind.
>
> 52.2 Purchaser's waiver
>
> If the purchaser does not rescind this contract within the period in clause 52.1 the right to rescind is waived by the purchaser.

10 The draft strata plan documents that were attached to the contract provided for a strata scheme that would have 153 lots. The draft plans showed a number of basement levels which had no details included, and were stated to be "under review". The location of the carspace the subject of the contract was thus not specified. The home unit that was to be included in Lot 107 was shown on the draft plan as located on level 7 of the building.

11 It is apparent from Special Condition 61.4 that the vendor had lodged an application for a development consent in respect of the site. The contract was made conditional upon the vendor obtaining a consent on terms acceptable to it.

12 Amongst the documents that were attached to the contract was a Planning Certificate issued pursuant to s 149 of the *Environmental Planning and Assessment Act 1979* (NSW). The certificate referred to various instruments and plans that apply to the carrying out of development on the land, including the City of Ryde Development Control Plan 2014 ("the 2014 DCP"). Part 9.2 of the 2014 DCP is headed "Access for People with Disabilities". Of particular relevance are the following provisions:

> 3.1 Environmental Planning and Assessment Act 1979
>
> The Environmental Planning and Assessment Act (EPAA) 1979, regulates and controls the carrying out of developments in NSW.
>
> Council when assessing applications for development, construction certificates and complying development certificates, needs to ensure that the [sic] any proposed building works meet the requirements (where applicable) of the new Commonwealth Disability (Access to Premises – Buildings) Standards (the Premises Standards and the Access Code which came into force on 1 May 2011 and contained within the Building Code of Australia (BCA).
>
> …
>
> 3.5 The Commonwealth Disability (Access to Premises – Buildings) Standards (the Premises Standards)

The Commonwealth Disability (Access to Premises – Buildings) Standards (the Premises Standards) commenced on 1 May 2011.

The Premises Standards set out administrative provisions and an Access Code detailing technical requirements. The Access Code is mirrored in the Building Code of Australia (BCA), to ensure consistency with the BCA, and sets out performance requirements and detailed deemed-to-satisfy provisions.

…

4.1 Coverage of this Part

The following information sets outs [sic] the provisions of this Part as applicable to particular Classes of buildings and includes the requirements of the new Premises Standards (and corresponding changes to the Building Code of Australia).

Compliance with the new Premises Standards, simultaneously with the BCA, is to be achieved by compliance with the Performance Requirements. This can be achieved by compliance with the deemed-to-satisfy provisions or the development of an alternative solution, or by a combination of both, as specified in the BCA.

…

When the Premises Standards apply

The Premises Standards apply to buildings and structures governed by the BCA that require building approval, that is applications for:

a construction certificate

a complying development certificate.

The Premises Standards apply to any application lodged on or after 1 May 2011 for:

the erection of a building

alterations and additions to an existing building

an application for a change in building use where building works are proposed or required to meet fire safety standards.

…

4.1.3 Class of Building – Class 2

A building containing two or more sole-occupancy units each being a separate dwelling, excluding buildings of Class 1.

Requirements under this Part

New development

An accessible path of travel from the street to and through the front door of all units on the ground floor, where the level of the land permits. If the development has three or more residential storeys, with 10 or more units, to all units on all storeys.

In developments with three or more habitable storeys and with 10 or more units a percentage of units shall comply with the provisions of a Class A adaptable unit as specified in AS4299, in accordance with the following ratio:

- *up to 9 units, the provision does not apply*
- *10-15 units, 1 adaptable unit*
- *16-20 units, 2 adaptable units*
- *21-30 units, 3 adaptable units*
- *10% of units thereafter'*

…

6.1 Introduction

As people age, experience ill health or acquire a disability, their housing needs will change. Homes which have been perfectly satisfactory become unsuitable due to access problems – for example, steps, small bathrooms, high kitchen benches. This usually means either modifications to improve access or the need to purchase a new home. Either way this is an expensive and disruptive exercise.

Buying a house or unit that is accessible or that can be easily adapted, is extremely difficult due to the lack of accessible housing stock.

…

Council is committed to increasing the amount of housing stock that is adaptable.

Australian Standard AS4299 sets out the requirements of adaptable housing. Some of the more important features are summarized in the following pages.

AS4299 encourages the certification of adaptable houses into one of three classes of adaptable housing, A, B and C.

A house is classified as Class A, B or C depending on the number of features specified in AS4299 that are incorporated in the design. AS4299 designates features as being “essential”, “first priority desirable” or “desirable” depending on their importance to a person with a disability.

An Adaptable House Class A is one which all essential and desirable features are incorporated.

An Adaptable House Class B has all essential and at least 50% of desirable features, including all those designated as “first priority”.

An Adaptable House Class C has all essential features incorporated.

Adaptable housing can apply to all kinds of housing – single dwellings, semi detached, bed sitters, urban housing, town housing and units in multi storey blocks.

6.2 Requirements

Developments with 10 or more units shall have a percentage of those units that meet the specifications for the Adaptable Housing Standard AS4299, in accordance with the following ratio;

up to 9 units, this provision does not apply;

10-15 units, 1 adaptable unit

16-20 units, 2 adaptable units

21-30 units, 3 adaptable units, and

10% of units thereafter

As explained below, AS4299 provides for three Classes of adaptability. To meet Council's requirements, all adaptable units shall be designed and constructed to Class A.

…

6.4.5 Private Car Accommodation

Car space or garage shall have a minimum area of 6.0m x 3.8m with the vertical clearance above the car space a minimum of 2.5m.

Car space should be roofed, and any garage door should be a power operated roller door.

There should be a covered, accessible path of travel from the car space to the unit.

Car parking area should be illuminated to a minimum of 50 lx.

13 On 15 December 2015 the City of Ryde Council ("the Council") issued a deferred commencement development consent (LDA 2015/0031) in respect of the site, subject to numerous conditions. Condition 33 was in the following terms:

> Adaptable Units: A total of 42 adaptable units are to be provided within the development. These apartments are to comply with all of the spatial requirements as outlined in AS4299. Details demonstrating compliance is to be provided on the Construction Certificate plans. Prior to the issue of the relevant Construction Certificate, a suitably qualified access consultant is to certify that the development achieves the spatial requirements of A5[S]4299

14 Australian Standard AS4299-1995, headed "Adaptable Housing", relevantly provides:

> **3.7 CAR PARKING**
>
> **3.7.1 General** Private car parking spaces shall be large enough to enable a person with a wheelchair to get in and out of both the car and the parking space. A car parking space width of 3.8m minimum is necessary to enable a driver to alight, open the passenger side door, and assist a person with a disability into a wheelchair, or for a side-loading ramp. A 3.8m minimum width is also required for a driver with a disability to unload a wheelchair and to alight. A roof to the car parking space is desirable.
>
> NOTE: If it is required to unload the wheelchair within the garage, an internal vertical clearance of 2.5m is necessary to operate a car roof wheelchair unit.
>
> **3.7.2 Garages and carports** Garages and carports shall have minimum internal dimensions of 6.0m x 3.8m. A 2.5m internal vertical clearance is desirable. A garage may be reduced if a hardsurfaced level outside space of minimum dimensions 5.4m x 3.8m is provided as a sheltered carpark, or can be provided in the future. Provision for a power-operated roller door is desirable.

NOTE: A level surface includes surfaces with a gradient of up to 1:40.

3.7.3 Residential estate developments One car parking space per adaptable unit shall have minimum dimensions specified in Clause 3.7.2 and should otherwise comply with the requirements of AS2890.1 for parking for people with disabilities.

Surface car parking spaces should be convenient to the front door of the housing unit, rather than in a separate car park and should be covered. Access to the adaptable housing unit should also be covered.

Multistorey car parking should be in accordance with AS1428.2 in terms of clearances.

15 Australian Standard AS2890.1-1993, referred to in clause 3.7.3 of AS4299, made provision for parking spaces for people with disabilities in clause 2.4.5. One of the requirements was that such parking spaces be identified by a sign incorporating the ISA. However, AS2890.1-1993 was superseded by, and withdrawn following the publication of, AS/NZ 2890.6:2009, headed "Off-Street Parking for People with Disabilities". Clause 2.4 of that standard relevantly provides:

2.4 HEADROOM

The path of vehicular travel from the car park entrance to all parking spaces for people with disabilities and from those spaces to the car park exit shall have a minimum headroom of 2200mm.

The headroom above each dedicated space and adjacent shared area, measured from the level of the dedicated space shall be a minimum of 2500mm…

Clause 3.1 of that standard relevantly provides:

3.1 SPACE IDENTIFICATION

Each dedicated space shall be identified by means of a white symbol of access in accordance with AS1428.1 between 800mm and 1000mm high placed on a blue rectangle with no side more than 1200mm, placed as a pavement marking in the centre of the space between 500mm and 600mm from its entry point as illustrated in Figure 3.1.

…

The requirement for a symbol of access to be placed on the pavement shall not apply to any privately owned parking space for people with disabilities associated with a single residence and intended primarily for use by the occupants of that residence.

16 In any event, the construction certificate drawings in respect of basement level 2 depict nine of the fifty-six carspaces on that level as having the ISA. One of the nine is located in the same place as the carspace ultimately allocated to Lot 107.

17 On 6 December 2017 a construction certificate was issued in relation to the excavation and construction of the development (Stages 8 and 9). On 2 January 2019 an Interim Occupation Certificate was issued in respect of the construction of Stage 8. This certificate was served upon the plaintiff's solicitors on 7 January 2019.

18 Strata Plan 98937 was registered on 25 January 2019. Notification of the registration was given to the plaintiff's solicitors on 7 February 2019. It seems that completion of the contract was thus due by 22 February 2019 (although the defendant's then solicitors took the view that it was due by 28 February 2019).

19 The Strata Plan provided for a home unit component of Lot 107 on level 7 of the building and a carspace component of Lot 107 on basement level 2.

20 There are four basement levels extending from level 1 (on which level there are numerous visitor parking spaces on the common property) down to level 4. Levels 2 to 4 contain numerous carspaces that form parts of lots in the strata scheme, and a number of storage areas.

21 Evidence adduced by the plaintiff (including evidence given by Mr Gary Finn, architect) showed that none of the visitor carspaces on basement level 1 were marked with the ISA, but that nine of the carspaces on basement level 2 were so marked. It seems that each of those spaces was also marked with the applicable unit number. The home unit that forms part of Lot 107 is referred to as Unit 701. The plaintiff gave evidence to the effect that the carspace for Unit 701 would be the first of the carspaces marked with the ISA to be seen by a driver proceeding down from basement level 1 to basement level 2.

22 The plaintiff, as he was entitled to do under Special Condition 45 of the contract, conducted a pre-completion inspection of the property on 15 February 2019. On that occasion the plaintiff inspected the home unit, the allocated storage space, and the allocated carspace. In relation to the carspace he deposed that he observed that "the car space allocated to 701 had painted upon it the logotype or ideogram representing that the space is reserved for drivers of cars with a disability". The plaintiff took a photograph of the carspace.

The photograph shows that painted on the floor of the carspace is the number "701" and also the ISA.

23 On 18 February 2019 the plaintiff gave his solicitors a list of various defects in relation to the home unit. The list also included the following:

> My car space is marked as disabled as shown in the picture. This is not acceptable, as I am not disabled and it should not encourage anyone that is disabled to park here.

The plaintiff's solicitors sent the list to the defendant's solicitors on that day.

24 The defendant's solicitors sent a response to the plaintiff's solicitors on 20 February 2019. The response included the following:

> Regarding the additional issues raised by the purchaser we are instructed to respond as follows:
>
> …
>
> Disabled painting of my car spot. This apartment is an adaptable unit, which means that there is a requirement to label this car space as a disabled spot. The car space has been allocated to this property and the car space will be marked to the property. There is visitors disabled parking therefore it will not affect the purchaser's use of their car space.

The plaintiff gave evidence, which I accept, that this was the first time he was told that the home unit he was purchasing was an adaptable unit.

25 On 27 February 2019 the plaintiff's solicitors sent another letter to the defendant's solicitors. The letter included the following:

> This letter deals with the fact that the car space allocated to the lot carries on the floor a Handicapped logo or ideograph. This renders it probable that a visitor to the carpark would interpret the presence of the disability logo as meaning that the space was available to anyone with a disability. We are more than comfortably satisfied that if tested, our view as to that probability would prevail.
>
> Our client purchased a lot in a strata plan which was to include a car space. The notion of a car space included as part of the lot in a strata plan comprehends the further notion that, just as the habitable part of the lot will be exclusively available to the registered proprietor its visitors or tenants, so also will the car space allocated to and forming part of the lot. As we have noted, the presence of the disability logo clearly means that the space is available for use by the disabled public visiting the building in a motor vehicle.
>
> Our client instructs us that he would not have bought the unit had he been aware that access to the car space to be allocated to it would be available in this way to the disabled public as well as to our client. He wanted to be certain that on arrival in the building there would be a place to park his car.
>
> …

> We have been instructed to enquire what your client intends to do about the matter.

26 It appears that preparations were made by the parties for a settlement of the contract to possibly occur on 28 February 2019. Late in the morning of 28 February 2019, the plaintiff's solicitors sent an email to the defendant's solicitors which included the following:

> …
>
> At the moment (11:48am on 28 February 2019) our client is unable to get access to the building to ascertain if the handicapped logo has been removed. We do not have the assurance of your client which our client requires that the lot is not an adaptable lot required to share the allocated carspace with others.
>
> …
>
> Subject to resolution of this matter, our client is ready willing and able to complete the contract and this can be demonstrated should the issue ever arise. However, we are not prepared to put a number of parties to the inconvenience of attending a settlement if at settlement your client cannot (or will not) transfer to our client that which he agreed to buy.
>
> If you wish our client to settle today, you should advise us by noon that your client has
>
> removed the logo from the carspace; and
>
> taken any other step required to ensure that the lot is not an adaptable lot where our client may later be required to reinstate such a logo.

27 No response was given, and the settlement did not proceed. Indeed, no response had been received by 5 March 2019 when the plaintiff's solicitors sent a further letter to the defendant's solicitors. This letter included the following:

> Our client had made his position clear: he is (and has been since 28 February 2019) ready and able to settle and is willing to do so if your client is able to cause the removal of the handicapped logo from the surface of the car park and provide a warranty and assurance that thereafter our client will not ever be required to reinstate the marking. This is asking for nothing more than that which our client agreed to buy. Indeed, as we have said, he would not have agreed to buy the unit if he had known that the car space would be available for parking by third parties.
>
> Without that assurance, we invite your client to explain what an "adaptable unit" is, why our client's lot was chosen as an adaptable unit, what the consequences of being an adaptable unit are and why, given what we have already said, he should complete the purchase. We note that the by-laws have no reference to the term "adaptable unit" or similar term; nor does the contract.
>
> …
>
> We note that our client inspected the car space this afternoon at about 5:15pm or so, and the marking is, as the attached photo clearly shows, still present.

28 Again, there was no response. On 21 March 2019 the plaintiff's solicitors sent yet another letter to the defendant's solicitors. The letter included the following:

> We refer to our previous communications of 27 February 2019 and 5 March 2019 in relation to this matter and note that we have yet to obtain a response.
>
> The issues raised in that correspondence are very serious. We have had a single indication as to why a handicapped logo or ideograph has been painted on the car space allocated as part of the lot which our client contracted to buy. This was that the unit was an "adaptable" unit. Your answer to a suggestion that a handicapped driver seeing the logo would assume that it was a car space reserved for handicapped drivers, and that it would therefore not be available exclusively to our client, was "there is visitors disabled parking therefore it will not affect the purchaser's use of their car space".
>
> There are two responses to this observably incorrect observation: first, that from the vehicular entrance to the building to the location of the car space allocated to the lot which our client contracted to purchaser there are, in fact, no car spaces bearing the handicapped logo. Thus, the first car space with a handicapped logo which a disabled driver would see would be that allocated to the lot which our client was buying. If unoccupied, a handicapped or disabled driver would park on our client's lot.
>
> …
>
> We have invited your client to address these issues, but it has failed to do so. It is our client's view that your client is not capable of transferring title to the apartment which our client contracted to buy. Our client has been endeavouring to ascertain what your client's position is in relation to the matter – for instance, having the logo removed and providing a legally enforceable assurance that our client cannot ever be required to reinstate it – before he determines what he will do. Your persistent refusal to address the issues is limiting the options available to our client.

29 On 22 March 2019 the plaintiff's solicitors sent a Notice of Rescission to the defendant's solicitors, whereby the plaintiff purported to immediately rescind the contract and demand the return of the $72,000 deposit, together with all interest earned upon it. It is not necessary to set out the entirety of the asserted grounds for the rescission. It is sufficient to record the following:

> …
>
> D. At the time of registration of the Strata Plan, a car space was included as part of the lot comprising the home unit and the car space (Lot 107), but that part of Lot 107 being the car space was designated as handicapped or disabled parking by the addition, on the floor of that part of Lot 107 comprising the car space, in permanent paint or marking of a logotype or ideograph indicating that the space was reserved for use by handicapped or disabled drivers.
>
> E. The representation in the Contract that the Vendor would transfer title to the Purchaser of Lot 107 being a "home unit" and a "car space" was a representation that both the car space and the home unit to which the Purchaser would have access possession and use would be access

> possession and use to the exclusion of all persons other than the purchaser his tenants or licensees;
>
> …
>
> G. The misrepresentation as to the access possession and use of the car space forming part of Lot 107 is so substantial that the Vendor is seeking to require the Purchaser to accept title to something that is materially different to that which the Purchaser contracted to buy.
>
> …
>
> I. By reason of the misrepresentation and the fact that the property is significantly and materially different to the detriment of the Purchaser to that which the Purchaser contracted to buy entitles the Purchaser to rescind the Contract and to recover the deposit paid and interest earned thereupon from the depositholder.

30 The plaintiff's solicitors made a further demand for the return of the deposit on 3 April 2019. The commencement of proceedings was foreshadowed.

31 On 5 April 2019 the defendant's solicitors sent an email to the plaintiff's solicitors in which the validity of the purported rescission was disputed. The email included the following:

> Our client denies the validity of your client's purported Notice of Rescission served on 22 March 2019.
>
> Your client was aware at all times that he was purchasing an adaptable unit.
>
> Whilst the car space attached to his unit is marked as a disabled space, which is a requirement where a unit is an adaptable unit, it is not capable of being used by anyone else and is clearly marked with the unit number of your client's property. That is, it is for the exclusive use and benefit of your client.
>
> As your client is also aware the building has its own disability parking for use by invitees and visitors of the building who require disabled parking.
>
> In the event that your client wants to have the disabled signs removed from his car space he can approach the owners corporation after settlement to arrange this.
>
> In the light of the above our client requires your client to settle his purchase without further delay and in the meantime continues to reserve its rights in relation to this matter.

32 On 8 April 2019 the plaintiff's solicitors sent another letter to the defendant's solicitors, confirming that the plaintiff regarded the contract as "validly rescinded and at an end", and reiterating the arguments in support of the plaintiff's position.

33 The proceedings were commenced by the plaintiff on 10 May 2019.

Submissions

34 The plaintiff submitted that the presence of the disabled parking symbol (the ISA) on the Lot 107 (or Unit 701) carspace indicates that the space may be used by disabled persons with a current disabled parking permit, and results in the owner of the lot not having exclusive use of the space. It is submitted that the presence and effect of the disabled parking symbol constitutes a substantial and material departure from the terms of the contract for sale, and hence gives rise to an entitlement to rescind in accordance with the principle enunciated in *Flight v Booth* (supra). It was further submitted that Special Conditions 52 and 58.2, which limit or exclude the purchaser's rights of rescission, should be construed against the defendant and not so as to exclude a right to rescind in accordance with *Flight v Booth* (supra). It was also put that the 14 day period referred to in Special Condition 52 would not commence until a reasonable time had passed following the plaintiff's final request for the removal of the ISA on 5 March 2019.

35 The plaintiff submitted that having regard to the well-recognised meaning of the ISA, the Court should not accept the contention that the plaintiff would have exclusive use of the carspace upon completion of the contract. It was submitted that in light of the manner in which some of the carspaces in the basement were marked with the ISA, there was a real risk that a driver who held a disabled person's parking permit would park in the Unit 701 carspace, thereby depriving the owner of its use. The plaintiff contended that the contract had been validly brought to an end, and he was entitled to a refund of the deposit together with interest.

36 The plaintiff submitted, in the alternative, that he was entitled to substantially the same relief pursuant to the *Australian Consumer Law* by reason of misrepresentations made by the defendant. The misrepresentations were said to be to the effect that Lot 107 would be provided with a dedicated carspace for the plaintiff's exclusive use. It was further said that the defendant failed to disclose that the lot was to be constructed as an adaptable unit. It was submitted, by reference to evidence given by the plaintiff, that the plaintiff relied upon the representations made by the defendant in deciding to enter into the contract, and would not have proceeded had he been told that the lot the

subject of the contract was to be an adaptable unit and that the carspace would contain the ISA.

37 Finally, the plaintiff submitted that even if he failed to make out the above claims, the Court should exercise the discretion under s 55(2A) of the *Conveyancing Act* to order the return of the deposit. In this regard the plaintiff relied upon all the circumstances of the case including the defendant's response (or lack of response) to the plaintiff's complaint about the presence of the ISA.

38 The defendant submitted that the plaintiff had no right to rescind the contract as the plaintiff received (or would receive on completion) substantially what he had contracted to purchase. The defendant submitted that the ISA was not required to be present in the Lot 107 carspace even though Lot 107 (or Unit 701) had been designed as an adaptable unit. It was put that the unit being an adaptable unit did not affect the ownership of the unit or mean that the owner would have anything less than exclusive use and enjoyment of the property. The defendant took issue with the contention that the presence of the ISA gave rise to a real risk of unauthorised persons making use of the Lot 107 carspace. It was put that this was most unlikely to occur. The defendant submitted that, in any event, any right to rescind was excluded by Special Condition 58.2, or not made within the time limit set by Special Condition 52.

39 The defendant denied that it was guilty of any misrepresentation, or that it otherwise engaged in any conduct that was misleading or deceptive or likely to mislead or deceive. It was suggested that the plaintiff was on notice of the fact that the defendant had lodged a development application, and that some adaptable units were contemplated. The defendant submitted that the absence of any misrepresentation made by or on behalf of the defendant was a material factor to be taken into account in relation to the claim under s 55(2A) of the *Conveyancing Act*. Reference was also made in this regard to Special Condition 36.1(a) which contains a warranty by the plaintiff that he did not enter into the contract as a result of any representation or promise made by the defendant apart from those given in the contract itself.

Determination

40 The statement of the rule in *Flight v Booth* (supra) was made in that case by Tindal CJ in the following terms:

> In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale…

41 I recently discussed the operation of the rule in *Flight v Booth* (supra) in *Victorsen v Easy Living Holdings Pty Ltd* [2019] NSWSC 1721 at [62]-[65] as follows:

> [62] The manner in which the principle operates as part of the law relating to contracts for the sale of land is illustrated by the authorities collected by White J (as his Honour then was) in *Vella v Ayshan* [2008] NSWSC 84 at [73]-[75] where his Honour stated:
>
> > [73] However, there is the more fundamental question of what is the subject matter of the contract. It is of first importance that the contract is one for the sale of land. As Walsh JA (as his Honour then was) said in *Beard v Drummoyne Municipal Council* (1969) 71 SR (NSW) 250 at 265:
> >
> > > *"... apart from any relevant special provision, a purchaser [of land] may have a right to rescind, or at his option to go on with the contract, extending to deficiencies between promise and performance which would not be, in the case of other contracts, such as to enable him to treat himself as discharged from the contract, but which would 'sound in damages'."*
> >
> > [74] In *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1, Menzies J said (at 27-28):
> >
> > > "*Williams on Vendor and Purchaser*, 4th ed. (1936), at pp. 34-37 sets out the chief duties of a vendor at common law:
> > >
> > > 1. To show a good title to the property sold;
> > >
> > > 2. To produce land corresponding substantially in all respects with the description contained in the contract and available to be transferred to the purchaser in fulfilment of the contract; and
> > >
> > > 3. To hand over to the purchaser on completion all deeds and other muniments of title relating solely to the property purchased. This case concerns the second of these duties.
> > >
> > > *At common law, any difference, however trivial, between the land described in the contract and the land produced constituted a defect which entitled the purchaser to rescind.*

> *Where there was only a slight difference, the Courts of Equity began to interfere and introduced the principle of compensation for deficiency: see Erskine L.C. in* Halsey v. Grant *(1806) 13 Ves. Jun. 73 at 76-9; [1806] EngR 290; 33 ER 222 at 223-224. Unless the deficiency was so substantial as to give the purchaser something entirely different from what he had contracted, equity would order specific performance on giving compensation for the deficiency."*

> [75] In *Batey v Gifford* (1997) 42 NSWLR 710, Handley JA said (at 716) that:
>
> > *"The vendor's obligation at law under a contract for the sale of real estate by description was similar to that of a seller under a contract for the sale of goods by description. The description was an essential term of the contract and the purchaser could reject the goods if there was any difference, other than trifling, between the goods tendered and the contractual description."*
>
> See also *Dainford Ltd v Lam* (1985) 3 NSWLR 255 at 265-266; *Tarval Pty Ltd v Stevens & Ors* (1990) NSW ConvR 55-552.

> [63] As noted by his Honour at [81], "substantial" in this context does not mean large; it means of substance rather than merely nominal.
>
> [64] In *Higgins v Statewide Developments Pty Ltd* (2010) 14 BPR 27,293; [2010] NSWSC 183 Barrett J (as his Honour then was) stated at [45] that the principle is concerned with a "discrepancy between the subject matter of the contract for sale and what is available to be conveyed in satisfaction of the vendor's obligation". Questions sometimes arise, and did so in that case, as to whether particular provisions of the contract cut down or oust the operation of the principle. However, as Barrett J stated (at [46]), the principle will not be ousted except by very clear words or very clear implication…..
>
> [65] The starting point in applying these principles is the ascertainment of the subject matter of the contract; that is to say, the identification of that which the vendor has promised to convey.

42 Under the contract for sale in the present case, the defendant promised to convey a lot (Lot 107) in a strata scheme that was to be registered, with the lot to comprise a home unit and a carspace. Upon registration of Strata Plan 98937, Lot 107 came into existence. The boundaries of the lot can be discerned from the floor plans of the strata scheme. The plaintiff does not contend that the home unit component of the lot differs from that which was promised under the contract. His complaint is focused upon the carspace, and in particular the presence of the ISA. It is not suggested that the carspace proposed to be conveyed as part of Lot 107 otherwise departed from that which was promised under the contract. As the plaintiff stated in the course of cross-examination, he complains about the affixing of the ISA on the carspace:

"Because I don't I won't have exclusive use. I run the risk of someone parking on my park spot".

43 However, upon completion of the contract the plaintiff would be in a position to become the registered proprietor of Lot 107 in SP98937. As such, he would obtain title to the fee simple in accordance with the provisions of the *Real Property Act 1900* (NSW), including, of course, the provisions that confer indefeasibility of title. The plaintiff would thus obtain exclusive rights of ownership of Lot 107, including the carspace component of it. Subject to any rights granted by the plaintiff himself in respect of Lot 107, he alone would have the right to possess, and enjoy the use of, the lot. No other person would have a right to park in the Lot 107 carspace.

44 That is so even in the case of a holder of a disabled parking permit. The evidence adduced concerning the Australian Disability Parking Scheme and the New South Wales Mobility Parking Scheme did not establish that a disabled parking permit entitled the holder of the permit to park in a privately owned parking space that happened to be marked with the ISA. The evidence given by Mr Finn was to the effect that the New South Wales Mobility Parking Scheme applies to on-street parking and Council operated carparks, and would only apply in respect of a strata scheme if there was an agreement to that effect between the strata scheme and the local Council. In this regard, Mr Finn referred in his report to s 271 of the *Strata Schemes Management Act 2015* (NSW) and s 650A of the *Local Government Act 1993* (NSW). The former section, which confers a power to make regulations, does not seem to be relevant. The latter section provides for the establishment of strata parking areas which are regulated by a council in accordance with notices and signs erected by the council. As stated by Mr Finn, such areas are established pursuant to an agreement between an owners corporation of a strata scheme and a council. However, it is clear that a strata parking area must be part of the common property of a strata scheme (see s 650A(6)). Lots in a strata scheme cannot be the subject of a strata parking area established under s 650A of the *Local Government Act*.

45 The plaintiff maintains that at least as a matter of practicality, the presence of the ISA gives rise to a risk that holders of a disabled parking permit will park in the Lot 107 carspace. Whilst that risk could not be dismissed as fanciful, it strikes me as a small risk. The photographic evidence suggests that access to the basement carpark is controlled by a security system of some sort. Presumably, only lot owners or persons authorised by lot owners or the owners corporation would or should have the ability to access the carpark. In addition, a driver entering the carpark would first drive on level 1 where numerous visitor parking spaces are located before coming to level 2 (where the Lot 107 carspace is located). Finally, any driver (including a driver holding a disabled parking permit) considering parking on level 2 would not see any spaces marked only with the ISA. The nine spaces on that level that are marked with the ISA are also marked with the applicable unit number. These markings tend to suggest that the spaces are not intended for general use by disabled persons.

46 In any event, such risk as exists could be readily eliminated by painting over, or covering over, the ISA. I cannot see any reason why an owner of Lot 107 could not lawfully take steps to remove or conceal the ISA on the Lot 107 carspace. The plaintiff did not identify any legal obligation that would compel the owner to maintain the ISA on the carspace. Indeed, in the course of opening, counsel for the plaintiff said that it appeared to be common ground that there is no requirement for the ISA to be on the Lot 107 carspace. That seems to be the case even if Lot 107 is or was intended to be an adaptable unit. Any unit intended to be one of the 42 adaptable units to be provided in the development pursuant to condition 33 of the consent must only comply with the spatial requirements of AS4299. Even if the superseded AS2890.1-1993 applied, any requirement for the ISA would not in my view be a spatial requirement of AS4299. To the extent that clause 3.7 of AS4299 incorporates the requirements of AS/NZ 2890.6:2009, clause 3.1 of that standard seems to me to state that any requirement to identify a parking space for people with disabilities, by affixing the ISA, does not apply if the parking space is a privately owned space associated with a single residence and intended primarily for use

by the occupants of that residence. The Lot 107 carspace falls within that description.

47 Accordingly, an owner of Lot 107 would not only have the right to exclusively possess and enjoy the Lot 107 carspace; the owner would also be entitled to remove or conceal the ISA so as to eliminate the risk that its presence might encourage unauthorised use of the carspace by the holders of disabled parking permits. That is something that could be readily achieved. In these circumstances, I do not accept that the presence of the ISA on the Lot 107 carspace gave rise to a right of rescission in accordance with the rule in *Flight v Booth* (supra). The defendant was willing to convey Lot 107, which included a carspace, albeit one marked with the ISA. Even if the presence of the ISA amounts to a discrepancy between what the defendant promised to convey and what the defendant was prepared to convey, I do not think that the discrepancy, viewed objectively, is one of substance as opposed to merely nominal. Removal or concealment of the ISA could be readily achieved, probably at a relatively minor cost. It is not a discrepancy of such substance that it would cause specific performance, even with compensation, to be denied to the vendor.

48 It follows from the above that the plaintiff did not have a right to rescind the contract when he purported to do so on 22 March 2019. It is unfortunate that the defendant stated, incorrectly, that as Unit 701 was an adaptable unit the carspace was required to be labelled as a disabled spot. It is doubly unfortunate that the defendant failed to correct the position prior to the plaintiff's purported rescission of the contract. However, the matter could have been further investigated by the plaintiff before taking the serious steps of rescinding the contract and commencing the proceedings.

49 It is not strictly necessary to consider whether any right of rescission pursuant to the rule in *Flight v Booth* (supra) would in any event be excluded or defeated by the Special Conditions of the contract. I will state, however, that even though very clear words are needed in order to oust the operation of the rule in *Flight v Booth* (supra), Special Condition 58.2 appears to achieve that purpose where the asserted right of rescission is "in respect of the final car space". The

plaintiff submitted that Special Condition 58.2 did not operate in the present case because the carspace the defendant was prepared to convey did not qualify as a final carspace for the purposes of Special Condition 58. I do not think that is correct. The defendant was prepared to convey Lot 107, which included a carspace, albeit one marked with the ISA. The space did not cease to be a carspace merely because the ISA was affixed to it. In my opinion that carspace was "the final carspace" within the meaning of Special Condition 58. The Special Condition excludes rights of rescission that are "in respect of the final car space", including but not limited to the size and location of the carspace. The evident intention is to exclude rights of rescission on the grounds of the quality of the carspace. The right of rescission asserted by the plaintiff was in my view "in respect of final car space", and would thus in any event be excluded by Special Condition 58.2.

50 I turn now to the claim for relief under the *Australian Consumer Law*. The claim, as articulated in the plaintiff's Points of Claim, rests in part upon allegations that at all relevant times up to the time the contract was entered into, the defendant was aware that the lot proposed to be purchased by the plaintiff was to be an adaptable unit which would have an accessible carspace to which the ISA would be affixed (see Points of Claim at paragraphs 25 and 26). These allegations, which were denied by the defendant, were not made out on the evidence.

51 When the contract was entered into on 22 August 2015, the defendant did not have a consent for the proposed development of the site. An application for a development consent had apparently been made (see Special Condition 61.4) but the form of the application was not adduced in evidence. It seems likely that Lot 107 was not earmarked to be an adaptable unit until construction certificate drawings were produced, probably in 2016, after the grant of the development consent. It was not put to Ms Tan, who was called to give evidence in the defendant's case, that the defendant, at the time the contract was made, intended proposed Lot 107 to be constructed as an adaptable unit. The assertion made on 5 April 2019 that the plaintiff was aware at all times that he was purchasing an adaptable unit seems to be another erroneous statement made by the defendant.

52 However, when the contract was made, the provisions of Part 9.2 of the 2014 DCP (a plan referred to in the Planning Certificate annexed to the contract) would have indicated to a reader that a number of units in the development would ultimately be required to be constructed as adaptable units as specified in AS4299.

53 It is clear that before the contract was made the defendant said nothing to the plaintiff (or the plaintiff's father, who also had some pre-contractual dealings with the defendant) about proposed Lot 107 being constructed as an adaptable unit. This was first made known to the plaintiff on 20 February 2019. Nevertheless, I do not accept that the defendant made any false or misleading representations, or otherwise engaged in conduct that was relevantly misleading or deceptive or likely to mislead or deceive, as alleged in paragraphs 28 to 33 of the Points of Claim. In the circumstances that existed when the contract was made the defendant, by contracting to convey a lot with a carspace, and by not stating that the proposed Lot 107 was to be constructed as an adaptable unit, did not falsely represent that the plaintiff as the owner of the lot would have exclusive rights of possession and use of the carspace. As explained earlier in these reasons, even if Lot 107 was constructed as an adaptable unit, the plaintiff would obtain those rights following completion of the contract and would be entitled to remove or conceal any ISA that was present on the carspace. Further, there was no misrepresentation about whether proposed Lot 107 would be an adaptable unit. It was not shown that the lot was then intended to be so constructed, although there was a prospect, deriving from the 2014 DCP, that it ultimately might be. The defendant made no representation at all about whether proposed Lot 107 would or might ultimately be constructed as an adaptable unit. It was silent about that matter, but in circumstances where both parties were in a position to appreciate that the proposed lot might ultimately be constructed as an adaptable unit, and in the absence of any enquiry by the plaintiff in that regard, it would not be reasonably expected that the defendant would volunteer any information about the matter (see *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; [2010] HCA 31 at [18]-[20] and [91]).

54 For these reasons, the plaintiff has failed to establish that the defendant contravened either s 18 or s 30 of the *Australian Consumer Law* as alleged. The claim for relief under the *Australian Consumer Law* must therefore be rejected.

55 The final matter to consider is the plaintiff's claim under s 55(2A) of the *Conveyancing Act* for a refund of the deposit he paid. In my opinion, this is not an appropriate case for the exercise of the power to order the refund of the deposit. The Court has found that the plaintiff was not entitled to rescind the contract, as he purported to do on 22 March 2019, and has rejected the plaintiff's claim for relief under the *Australian Consumer Law*. The defendant has not sought to terminate the contract and forfeit the deposit. The contract remains on foot, and the deposit remains with the vendor's solicitor named in the contract, who holds it as stakeholder. In these circumstances I can discern no warrant for the order sought by the plaintiff. The deposit should remain where it is pending the completion of the contract, or the contract coming to an end in some other way. The deposit will in the meantime serve its central purpose as an amount paid by the purchaser in earnest of performance of the contract (see *Brien v Dwyer* (1978) 141 CLR 378 at 385-6, 398 and 406).

Conclusion

56 The Court will order that the proceedings be dismissed. There seems to be no reason why costs should not follow the event in accordance with the usual rule (see Uniform Civil Procedure Rules 2005, r 42.1), so the Court will also order that the plaintiff pay the defendant's costs of the proceedings.

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