DISTRICT COURT OF QUEENSLAND

CITATION:	*Royce v Phillis & Anor* [2020] QDC 302
PARTIES:	**STEPHEN ROYCE** (appellant) **v** **STEWART IAN PHILLIS** (first respondent) **and** **SUSAN GLORY PHILLIS** (second respondent)
FILE NO/S:	D122/2019
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court at Southport
DELIVERED ON:	27 November 2020
DELIVERED AT:	Southport
HEARING DATE:	8 October 2020
JUDGE:	Kent QC, DCJ
ORDER:	**1. The appeal is dismissed** **2. I will hear the parties as to costs**
CATCHWORDS:	CONVEYANCNG – BREACH OF CONTRACT FOR SALE AND REMEDIES – PURCHARSER'S REMEDIES – BREACH OF VENDOR'S STATUTORY DISCLOSURE OBLIGATION OR STATUTORY WARRANTY – where the appellant purchased a property in a community titles scheme – where the appellant claims breach of contract and damages on the basis that the respondents breached their disclosure obligations imposed on them pursuant to the *Body Corporate and Community Management Act 1997* (Qld) – where the appellant alleged that the respondents failed to disclose: planned roadworks for the estate, that the security monitoring system had been decommissioned , that the sign regarding the security system was misleading and the true nature of the fence surrounding the property – where the learned Magistrate dismissed the appellant's claims at first instance – whether the respondents breached their disclosure obligations to the appellant – whether the learned Magistrate erred in her reasoning and/or denied the appellant natural justice and procedural fairness at first instance.

CASES:	*Flightdeck Geelong Pty Ltd v All Options Pty Ltd* [2020] FCAFC 138 *Mehmet v Carter* [2020] NSWSC 413 *Menniti v Chan* [2007] QSC 190 *Menniti v Winn* [2009] 2 Qd R 425
LEGISLATION:	*Body Corporate and Community Management Act 1997* (Qld), ss 206, 207, 223
COUNSEL:	Appellant self-represented J Hewson for the respondents
SOLICITORS:	Appellant self-represented Simon Taylor for the respondents

Background

[1] This is an appeal against a determination of the Magistrates Court at Southport delivered on 17 April 2019 whereby the appellant's claim against the respondents was dismissed.

[2] Broadly, the appellant's claim related to a property purchased by him from the respondents in 2008. That property was a lot in a community titles scheme, "Glencairn Estate", in a rural area at Trees Rd, Tallebudgera at the Gold Coast. The appellant's complaints relate to various matters concerning the property which he claims were not fully disclosed to him at the time of purchase.

[3] As set out by the Magistrate, the further background is that the proceedings originally involved a claim by the body corporate against the appellant and Sandra Louise Royce for allegedly outstanding body corporate fees. The appellant defended those proceedings in June 2014 and thereupon issued a number of third party notices, including to the present respondents. The original claim by the body corporate apparently resolved in 2016 and the appellant also discontinued his counterclaims against other parties, leaving the present proceeding as the only remaining litigation on foot.

[4] On 7 November 2018 the appellant filed a document entitled "affidavit in support of summary of counterclaim cross-referenced with the list of trial documents and calculations". Attached to that affidavit was Annexure 1 entitled "Summary of Counterclaim in M52/14". A magistrate sitting in the Coolangatta Magistrate's Court granted the appellant leave to rely on the annexure as "new pleadings" and

leave for the respondents to respond by 30 November 2018. This apparently occurred and the matter was adjourned to the Magistrates Court at Southport for hearing.

[5] The Magistrate below, appropriately, treated the annexure as the appellant's pleading, and, with respect, did her best to interpret that document and attribute to it the appellant's claims as best they could be understood and formulated. Dealing with a self-represented litigant presents challenges. A court should ensure the litigant has enough information about practice and procedure to make effective choices; inform them of procedures possibly advantageous; and ensure they have not, because of lack of legal skill, failed to claim rights or advance arguments. But there is not a duty to provide judicial advice, or counsel a litigant or conduct their case. The duty is factually idiosyncratic and depends on the circumstances[1]. Her Honour dealt appropriately with these issues.

[6] As outlined above, the matter was heard on 20 December 2018 and by judgment delivered on 17 April 2019, the appellant's claims were dismissed.

The issues

[7] The Magistrate interpreted the new pleadings, correctly in my view, essentially as a claim for damages for breach of contract. The contract for the purchase of the lot was entered into on 21 September 2008 and settled on 15 December 2008. Essentially, the appellant asserts that the respondents breached their disclosure obligations, primarily as imposed upon them by the *Body Corporate and Community Management Act* 1997 (some provisions of which, as set out below, imply statutory warranties) by failing to disclose a number of matters:

(a) Planned roadworks for the estate, and the consequent obligations to be cast upon the incoming purchasers.

(b) That the TV/video monitoring system located at the entry to the estate had been decommissioned;

(c) That the sign regarding the security system at the entrance to the estate was therefore misleading;

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[1] See *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* [2020] FCAFC 138 at [51]-[57] and the cases there referred to

(d) The extent of the security fence surrounding the property, which was said to be described in the following terms: "A two metre high fence surrounds the majority of the accessible parts of the estate."

[8] There were also complaints at the trial as to disclosure about the estate sinking fund forecast and the degree to which records and management were being questioned by lot owners. However these matters did not form part of the arguments pressed on appeal.

[9] The Magistrate accurately summarised the damages claimed by the unrepresented appellant as follows:-

(a) The cost to fix the road - $42,000.

(b) 7 per cent of the purchase price of $737,000 characterised as an "overpayment of non-existing features" - $51,590.

(c) Interest on that amount from 15 December 2008 to 8 November 2018 - $29,971.31.

(d) Excessive stamp duty being stamp duty calculated on the "excess price of $59,590" - $1,537.45.

(e) Interest on that stamp duty - $893.90.

(f) Loss of value on resale calculated at 7 per cent of $1,000,000 - $70,000.

(g) Interest on the mount of $199,591.96 required to fix the road - $2,589.99.

[10] As outlined above, all of these claims were dismissed.

Grounds of appeal

[11] There are a number of grounds of appeal which are difficult to interpret, however attempting to summarise them they include criticism of the Magistrate for, as it is put, inadvertently "reconstructing" part of the agreed sales contract; errors in interpretation of the contract including reference to a requirement of "material prejudice" as part of the purported cause of action relating to the undisclosed resolution as to roadworks; "errors of statute law" which are otherwise unidentified; "errors of common law" which are also unidentified but involve, as I understand it, an attack on the overall conclusions reached by the Magistrate on the various issues

of liability – including the issues about the security system and the fence - as well as some perceived difference between the way in which a previous magistrate interpreted the "pleadings" and the interpretation of that document by the trial magistrate; and, finally, an alleged denial of natural justice and/or procedural fairness.

Ground re: "reconstructing" the sale contract

[12] The first of these grounds can be disposed of briefly. In paragraph [10] of the judgment, referring to the arguments about planned roadworks, the Magistrate reproduced cl 8.4 of the contract between the parties. Her Honour appears to have made an error in transcribing cl 8.4, which is of no significance. The provision referred to by the Magistrate as 8.4(2)(b) is in fact 8.4(4). That is the only transcription error, and it does not affect the Magistrate's reasoning which, for the reasons set out below, in my conclusion was correct.

Failure to disclose resolution

[13] Clause 8.4(2) provided the buyer with a right of termination of the contract by notice in writing to the seller, before settlement, "if it is materially prejudiced by" such things as resolutions of the body corporate passed after the contract date (as set out below, a resolution did occur after the contract date). This is in contrast with clause 8.4(4) which does not contain the requirement for material prejudice, but provides that where a resolution has been made and the buyer is not given a copy thereof before settlement, it may sue the seller for damages. The distinction is the lack of requirement for "material prejudice" if the claim is simply for damages rather than termination. In my view the error which I have referred to is a transcription error which, as I have said, does not impact on the correctness of the Magistrate's reasoning. The implications in this case of the failure to disclose a resolution are discussed below.

Planned Roadworks – Resolution 9 December 2008

[14] It is then convenient to deal with the appellant's substantive complaints, both at the trial and as agitated on appeal. The first of these is under the heading described as "planned roadworks". The scheme of which the subject property is part is in a semi-rural area involving blocks of land of approximately one acre in a bushland

setting, with dwellings developed thereon. Thus the community property includes the relevant roadworks giving access to the lots. The body corporate met on 9 December 2008; that is after the contract was entered into but prior to its conclusion. It was resolved that "Once sinking funds allow the committee obtain a minimum of two quotations for re-sealing the complex's roads and approve the preferred contractor to carry out such works. Maximum cost be limited to $25,000."

[15] As the Magistrate records, it is not disputed that the appellant was not given a copy of those minutes prior to settlement.

[16] The appellant gave evidence that he only became aware of this potential exposure to roadwork expenses after settlement; he was concerned that no quote had at that point been obtained and the extent of the damage was unknown. He said that had he been aware of the potential liability he would have either adjusted his offer or withdrawn from the purchase (this presumes, of course, that a right to terminate existed; had that ever come into play, the requirement of "material prejudice" would have required examination).

[17] At the stage when the original planned expenditure was $25,000, the appellant's share of that, mathematically, would have been $1,315. In fact what occurred was that it took some time for the road resurfacing to be organised and paid for, and it was considerably more expensive than the original provision. Sometime later, possibly in 2011, the appellant's share, which he has paid, was assessed and levied; the final figure was $6,078.94.

[18] However, as the Magistrate noted, at the time of completion of the contract the maximum exposure was $1,315 and this is the only (future) expense not disclosed at the time of settlement. The Magistrate found this, in the context of a purchase price of $736,600 (about .02% thereof), did not amount to material prejudice entitling the appellant to terminate the contract pursuant to cl 8.4(2)(a) (thus the appellant had not lost a right to terminate by reason of the non-disclosure). In my view this was the correct conclusion; the exposure to this future contingency was, in the scheme of things, not material, indeed, in my view, almost negligible.

[19] Moreover the respondent submits that there was no evidence in the case establishing that the roadworks were necessitated other than by "fair wear and tear" and thus s223 was not engaged in any case (s 223(2)(a)(i)). In my conclusion this is correct, which alone disposes of this ground.

[20] It is correct that by reason of the lack of information the appellant was denied the opportunity of attempting to negotiate a reduction in the purchase price, however as the Magistrate found, in the absence of material prejudice there was no obligation on the part of the respondents to agree to any such proposal, in which case the appellant would have been obliged to complete the contract at the original price. The Magistrate therefore found that the appellant had not suffered any actionable loss as a result of the non-disclosure. As her Honour found, as a result of the need for roadworks he has, as a lot owner, been exposed to sinking fund levies. However, the cause of this **has not been non-disclosure**, but rather **the necessity for the roadworks**[2]. In my conclusion, the non-disclosure did not result in material prejudice such as to entitle the appellant to terminate (this may, in the circumstances of this case, be a somewhat abstract discussion at this stage, because the contract was completed twelve years ago, although it might be argued that the wrongful deprivation of such a right would be compensable); and, perhaps more relevantly, it did not give rise to any right to sue for quantifiable damages.

[21] It follows that in my conclusion the Magistrate was correct to dismiss this aspect of the appellant's claim, and no error in the Magistrate's reasoning is identified.

The TV/video monitoring system

[22] The appellant was given information – not by the respondents, but by their agent - prior to his entering into the contract, in relation to the community title scheme; basically a brochure setting out relevant matters. A copy of the written document is an exhibit in the proceedings – it was Exhibit 7 before the Magistrate. It does not expressly refer to the presence of a tv/video monitoring system.

[23] Separately from the brochure, the estate has a front gate which includes a sign stating "private property monitored by video security". This seems to be the representation on which the appellant relies. The appellant's complaint is that that

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2 See para [16] of the judgment

sign was false and the visible security cameras at the entrance to the estate were not functional. This is because the body corporate had resolved to decommission the video monitoring system in 2002, some six years before the appellant's purchase (although it seems to be common ground that the Entry Gate is closed at all times and activated by remote control and intercom, so access to the property is controlled, from residents' houses). The appellant's unchallenged evidence was that he only discovered this after taking possession of the property, and thus his complaint includes that the respondents were in breach of the implied warranties, for example in s 223 of the *Body Corporate and Community Management Act* 1997 whereby the seller was required to warrant that as at the date of the contract, to the sellers knowledge there were no latent or patent defects in the common property or body corporate assets, other than;

(i) defects arising through fair wear and tear,

(ii) defects disclosed in the contract.

In this context, in order to be entitled to relief under s 223 (a) the appellant would need to show that there were such defects and that the Respondents knew of same.[3]

[24] Thus, the appellant's complaint is that the lack of a functioning TV/video monitoring system was a latent defect and the sellers were therefore in breach of the statutory warranty.

[25] On this point, the Magistrate found that the sign referring to monitoring by a video security system did not give rise to an obligation to disclose to a purchaser that the system was not operational; further, it could be considered to constitute a representation by the body corporate, not the defendants[4].

[26] The appellant referred to s 207 of the Act, which provides that when a contract is entered into, its provisions include the "disclosure statement and all material accompanying the disclosure statement". The disclosure statement (part of the contract of sale) made no reference to the video security system or any of its components, certainly not so as to indicate whether they were operational or

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3 *Menniti v Chan* [2007] QSC 190 at [54]; affirmed on appeal *Menniti v Winn* [2009] 2 Qd R 425

4 Paragraph [20] of the judgment

otherwise; nor, the respondents submit, was it required to. Thus, as the respondents argue, there was no failure to disclose.

[27] It is important to bear in mind that in considering the disclosure obligation under s 206, the generation and maintenance of the required categories of information is an obligation imposed on the body corporate, not the vendor.[5] However, clearly the disclosure notice contemplates reference to latent or patent defects in the common property or body corporate assets, and the seller is taken to have knowledge of significant body corporate matters that may affect the buyer, where the seller ought reasonably to be aware of such matters; s 223(4). The appellant also complains that the by-laws, of which he was given a copy, were suggestive of the idea that the system was still functional[6]. Whatever the merits of this, there does seem to have been a failure to clearly communicate the true status of the system at the time of purchase.

[28] Therefore in relation to a possible breach of warranty, the question is whether the lack of a functioning security system would fall in the category of a latent defect in the common property or body corporate assets, in breach of the warranty provided for by s 223. The evidence on the point was fairly clear; both of the respondents gave evidence that the video security system had been decommissioned well prior to their purchase of the property, and the leaving of the sign in place at the front of the property was, in their view, as a deterrent; see the trial transcript, T1-87 and 1-97.

[29] The respondents submit that in this context, a defect in the quality of the land (as opposed to a defect in title) means that the existence or non-existence of something relating to the property affects its value or desirability.[7] Examples are given such as a termite infestation or an undisclosed mining lease. Clearly the possible defect under discussion here is less serious than those examples.

[30] In my conclusion, the lack of such a system did not represent a latent defect requiring disclosure in circumstances where

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5 *Menniti v Winn* (supra)

6 This is a reference to by-law 14, referring to Entrance Access, although I am doubtful it actually does convey the meaning contended for.

7 *Mehmet v Carter* [2020] NSWSC 413 at [401]

- the body corporate had resolved, presumably for good reason, to decommission the system six years earlier;

- the sign itself was kept in place as something of a deterrent;

- there was no evidence as to the effectiveness or otherwise of the system when it was functioning (as compared, for example, to simply having the sign as a deterrent);

- there was no evidence as to the ongoing cost of maintaining such a system in working order, which may have presumably featured in the body corporate's decision making process in 2002 (and which costs would have to be taken into account in assessing the value of such a system, and thus the net loss in value, if any, because of its decommissioning, impacting on the value of the appellant's individual lot);

- nor was there any evidence as to any actual negative impact on the value, or even the desirability, of the property because of its absence.

The appellant complains that, as he is now aware of the status of the system, he would be obliged to reveal this to a potential purchaser should he wish to sell the property. No doubt this may be correct; but there is no evidence, by way of valuation or otherwise, that the issue would negatively affect the value or saleability of the property, or to what extent.

In all of the above circumstances, I do not regard the lack of the decommissioned system to rise to the level of a latent defect for the purposes of s 223(2) of the Act.

[31] If I am incorrect in this conclusion (i.e. if the lack of the system **does** amount to a breach of implied warranty), the further difficulty that the appellant faces is in establishing any quantifiable damages arising from breach of such a warranty. He complains that he was contracting for something which he did not receive. However, as outlined above in relation to the question of breach, there was no evidence as to any reduction in value of the property because of lack of a functioning video monitoring system. Nor was there any evidence as to its ongoing cost of maintenance, which would feature into the calculus of any reduction in value (i.e. the value of a functioning system may be offset by its cost). Thus, even if there

was a breach of warranty, which in my conclusion there was not, there was no proof of damages flowing therefrom. In my view, the Magistrate was correct to dismiss this part of the claim.

The existence of a 2 metre high security fence

[32] Again, the appellant challenges the conclusion of the Magistrate in relation to the breach of disclosure obligations in relation to the feature of the property.

[33] The appellants' evidence was that the vendor's agent had given him the document describing the complex which was Exhibit 7 before the Magistrate. That document, under the heading "Security" states "A 2 metre high fence surrounds the ***majority*** of the ***accessible*** parts of the estate" (emphasis added).

[34] As recorded by the Magistrate, the appellant's complaint was that while there was some fencing it did not surround the "majority of the accessible parts of the estate". The appellant acknowledged that the entrance which fronts Trees Road is fenced and the first 20 metres down the northern and southern sides of the entrance are fenced, however the rest of the property is not fenced. The fence near the front gate was the only part of the estate which was near a public road. The rest of the boundaries were surrounded by bushland.

[35] Moreover, the appellant acknowledged that a substantial portion of the boundary of the property was not accessible, in the sense that it contained steep drop offs such as to not be accessible on foot.

[36] Again, the ground of appeal involves consideration of the implied warranties pursuant to s 223 of the Act. The relevant warranty, in this case, would be that, as at the date of the contract, to the seller's knowledge there was no patent defect in the common property or body corporate assets other than those arising through fair wear and tear and defects disclosed in the contract. The disclosure statement does not refer to any details of the fencing.

[37] However, in my view the nature of the fencing discussed in the evidence in this case is not such as to amount to a patent defect, for the following reasons.

[38] The property is in a rural and elevated bushland setting. The appellant was cross-examined in relation to this matter at the trial and it was suggested to him that the fencing was along the accessible parts of the estate. He responded that a large part of the boundary involved a drop off into Currumbin Valley and so that, in his words, "you'd have to be a mountain goat to get up there". However he did argue that there are areas surrounding the estate, in bushland, where there are walking trails and, apparently, some "road trails", possibly fire service trails. He agreed that the area is bushland and there were no public roads in the vicinity.[8]

[39] The Magistrate's conclusions were that in view of the facts that

- the only parts of the estate which adjoined a public road were fenced;
- all the other boundaries were surrounded by bushland; and
- the defendant had an ample opportunity to inspect the property including the fencing prior to entering into the contract;

there was no breach of the disclosure obligations in s 223 or s 206 of the Act.

[40] In my conclusion, no error has been identified in the Magistrate's reasoning on this point. The respondent points to the reasoning in *Menniti v Chan*[9] where Wilson J concluded, for example, that the presence of asbestos in a building was not a defect for the purposes of s 223(2)(a), but merely the product of building practices at the time of construction.

[41] The fencing which does exist does not seem to differ from the description in the brochure, which was qualified as outlined above.

[42] Again, as with the complaint about the TV/video monitoring system, the appellant's difficulties include establishing that a defect is identified in the sense of something the existence or non-existence of which relating to the property affects its value or desirability. The broad thrust of the plaintiff's evidence seemed to be that the lack of complete fencing meant that people could wander into the area of the estate via walking trails in the bush. Other than his disquiet about this aspect, there was no

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8 Trial transcript 1-63 to 1-64.

9 *Supra* at [57]

particular evidence as to the effect on the value or desirability of the property because of the incomplete fencing.

[43] The fencing, if installed, would be over a very large distance (the property occupies 72 acres, about the size of a golf course). This obviously involves expense in installation, but also in maintenance. The cost of the ongoing maintenance would be a cost borne by the lot owners in the scheme proportionately. The existence of this ongoing obligation (if complete perimeter fencing were installed) could well affect the value of the appellant's individual lot negatively, despite some possible comfort to the appellant in the slightly improved degree of security.

[44] It also seems to me that questions of reasonableness enter into this assessment. Whilst it may be true that the appellant would like to exclude people on walking trails from the common property, it is not at all clear that a 2 metre fence would be effective in preventing all access, particularly in the more remote parts of the bushland surroundings of the estate. Moreover, it is not clear that such an arrangement, given the bushland setting and general environs, would accord with reasonable expectations. In my conclusion, consistent with that reached by the Magistrate, the non-existence of a complete fence is not something that affects the value or desirability of the property and so it does not rise to the level of constituting a defect for the purposes of the implied warranties in s 223 of the Act.

Procedural fairness

[45] The appellant complains that at the end of the addresses, which were otherwise normally conducted, the respondent's counsel handed up a case to the magistrate (*Menniti v Chan, supra*). Four relevant paragraphs were identified which discuss the nature of a claim under s 206 of the Act. This is conventional. Moreover, the appellant thereafter made further written submissions. These matters do not represent a breach of procedural fairness.

[46] The appellant also complains the male respondent "was caught instructing Ms Phillis on how to answer questions" when giving her evidence. The incident is recorded at T1-97 of the transcript. The male respondent was warned about his body language, and heeded the warning. This does not amount to any misconduct, much less a breach of the rules of procedural fairness. There is no merit in this ground.

Conclusion

[47] In all the circumstances, none of the grounds of appeal have merit and no error is identified in the reasoning of the Magistrate. It follows that the appeal must be dismissed. I will hear the parties as to costs.