When conveyances go wrong — Vendor breaches

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An unencumbered title is the main concern of any purchaser in any real estate transaction. Prior to 1986, the common law only required a vendor to reveal latent defects in title. Defects in quality fell squarely within the rule of caveat emptor. However since 1986, the vendor disclosure obligations pursuant to s 52A of the Conveyancing Act 1919 (NSW) has significantly diluted the rule of caveat emptor.

Introduction

This article will trace the evolution of the common law concept of caveat emptor where a vendor only had to disclose latent defects in title whether or not known to the vendor, to the constraints now placed on vendors via their obligations pursuant to s 52A of the Conveyancing Act 1919 (NSW) and s 18 of the Australian Consumer Law,[1] previously s 52 of the Trade Practices Act 1974 (Cth) and s 42 of the Fair Trading Act 1987 (NSW). It will also discuss the remedies that are available to a purchaser when these obligations of disclosure are not met by the vendor by looking at recent case law.

Vendor disclosure obligations and the common law

The primary obligation of a vendor in any real estate transaction is to complete the contract for sale and to provide an unencumbered title to the property. In Megarry and Wade, *The Law of Real Property* it is stated that:

> A good title means a title free from encumbrances. The term 'encumbrances' covers all subsisting third party rights such as leases, rentcharges, mortgages, easements and restrictive covenants. It also includes statutory liabilities, if they are not merely potential or imposed on all property generally.[2]

Prior to 1986, a vendor was only under an obligation to disclose latent defects in title. A latent defect in title is any defect in title which the purchaser could not have discovered upon an inspection of the property while exercising ordinary care.[3] The effect of a failure to disclose a latent defect in title may entitle a purchaser to rescind the contract for sale. The applicable principle which is often referred to as the principle in *Flight v Booth*[4] was that a purchaser is entitled to rescind the contract if the error and misdescription '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'.

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1 Located in Sch 2 of the Australian Consumer and Competition Act 2010 (Cth).

2 5th ed, Sweet & Maxwell, London, 1984, pp 611–12.

3 See *Fletcher v Manton* (1940) 64 CLR 37; [1941] VLR 55; [1940] ALR 337; BC4000007; *Ashburner v Sewell* [1891] 3 Ch 405; *Carlish v Salt* [1906] 1 Ch 335.

4 (1834) 1 Bing (NC) 370; 131 ER 1160.

Whether a defect in title exists is assessed at the time the contract is entered into.[5] A purchaser will therefore not have any redress if an encumbrance to the title occurs between exchange and settlement. Some examples of what has been found not to constitute latent defects in title include a potential easement,[6] the obligation to provide an easement,[7] a potential statutory charge or burden that might be imposed by a local council as the council might decide not to exercise its powers[8] and a potential risk of a demolition order.[9]

In *Liberty Grove (Concord) Pty Ltd v Yeo*,[10] the vendor plaintiff acquired a large parcel of land at Concord for the purpose of redevelopment. The vendor sought to sell a part of the land for which it had no use. The vendor did not disclose to the purchaser that there was a drainage pipe affecting the land. After exchange, the purchaser obtained from Sydney Water a diagram that showed the presence of a drainage pipe affecting the land. The purchasers were told that the pipe did not belong to Sydney Water. There was no easement for the drainage pipe registered on the title to the land. Further, neither the survey plan nor the s 149 certificate attached to the contract of sale disclose the drainage pipe. The plaintiff said that it did not know of the existence of the drainage pipe at the time the contracts were exchanged.

After exchange, the purchasers obtained two quotes for the redirection of a drainage pipe. The two quotes were for $34,045 and $38,000. The purchaser's solicitor wrote to the vendor's solicitor on two separate occasions and asked whether the vendor would be prepared to reduce the contract price commensurate with the reasonable estimate of the cost to move the drainpipe which the purchasers estimated were 600 mm in diameter.

The court held that the nondisclosure of the drainage pipe in the contract so far affected its subject matter in a material and substantial way that it may reasonably be supposed that, but for the failure to disclose, the purchasers might never have entered into the contract. The court was satisfied that the pipe line was a quasi-easement. In coming to that conclusion, the court was influenced by the following. First, that the drainage pipe ran through the centre of the land which meant that it would make it very difficult to build around it. Second, that the cost of the repositioning of the pipe was between $35,000 and $38,000. Third, that when the vendor had rescinded the contract for sale to the purchasers and tried to resell the land, the best price it could obtain was $315,000 — $175,000 less than the purchase price under the contract with the defendants.[11]

Interestingly, the vendor argued that special condition 9.3 of the contract which deprived the purchaser of any right to rescind or to claim compensation under the contract, removed the right of the purchaser to rescind or to claim compensation under the contract. The court held that special condition 9.3 had not removed the common-law right to rescind for a latent defect in title of the

5 *McInnes v Edwards* [1986] VR 161; (1985) V ConvR 54-180.
6 *Dormer v Solo Investments Pty Ltd* [1974] 1 NSWLR 428.
7 *Dougherty Bros v Garde* (1976) 2 BPR 9206.
8 *McInnes v Edwards* [1986] VR 161; (1985) V ConvR 54-180.
9 *Carpenter v McGrath* (1996) 40 NSWLR 39; [1997] ANZ ConvR 8; (1996) NSW ConvR 55-788; BC9604107.
10 (2006) 12 BPR 23,709; [2006] NSWSC 1373; BC200610787.
11 Ibid, at [22], [27].

kind discussed in *Flight v Booth*. The court held that to effect such a drastic and unfair foreclosure of rights against the purchaser would require very clear words.[12]

Unfortunately for the purchaser, the court held that the purchaser by seeking to negotiate compensation pursuant to the applicable provisions of the contract and the amount of $40,000 constituted an irrevocable election to affirm the contract. This meant that the notice of recession was invalid and the vendor had validly terminated the contract. The court held that the vendor was entitled to damages for the purchaser's breach of contract, being the difference between the contract price at which the vendor sold and the price at which it sold the land to a third-party in August 2005.[13]

However, the purchaser was granted relief against forfeiture of the deposit. The operative factors in granting relief against forfeiture of the deposit were threefold. First, that the purchasers had been placed in a very difficult situation through no fault of their own. Second, that the vendor had known of the existence of a drainage pipe line by reason of the knowledge of its engineers and, third, that if the vendor were to retain the deposit it would derive an undeserved windfall as the price payable by the purchasers of the land under their contract with the vendor was $175,000 more than its market value when the existence of the drainage pipe had been disclosed.[14]

Modification of the common law

The Australian consumer law — Defects in quality and when they should be disclosed

As the reader would be aware, the Trade Practices Act 1974 has been repealed and replaced with the Australian Consumer Law which is found in Sch 2 to the Competition and Consumer Act 2010 (Cth). Causes of action that arise after 1 January 2011 will be subject to the provisions of the Australian Consumer Law. However, the Trade Practices Act continues to apply to causes of action that arose before then. The substance of s 52 remains alive and well and is now found in s 18 of the Australian Consumer Law. The primary difference between the old s 52 and the new s 18 is that s 18 does not refer to a corporation but to a 'person'. Section 18 is therefore now in the same form as s 42 of the Fair Trading Act.

The prohibition of misleading or deceptive conduct does not apply to an information provider if the information provider made the publication in the

12 Ibid, at [32].

13 Ibid, at [36].

14 See *Eight SRJ Pty Ltd v Merity* (1997) 7 BPR 15,189 at 15,202 where Young J discusses relief against forfeiture and the relevant matters which influence a court as to whether it will exercise its jurisdiction under s 55(2A) of the Conveyancing Act. This case is also interesting because Young J discusses what consequential loss may be recoverable by a vendor when a vendor terminates a contract after a purchaser wrongly repudiates a contract by refusing to complete a contract. In that case, the purchaser had refused to complete a contract because of a defect in quality, namely, extensive termite infestation. Briefly, Young J held that a vendor was not entitled to damages in the nature of maintenance costs after termination, insurance premiums, land tax, interest that would have been earned on the purchase price if the sale had been completed and damages by way of interest forgone on the purchase price.

course of carrying on a business of providing information, unless the publication is an advertisement, in connection with the supply of certain goods or services or in connection with the sale or grant of certain interests in land, or the promotion of such a sale or grant.[15]

The activities of real estate agents and vendors can therefore fall within the prohibition set out in s 18 of the Australian Consumer Law. Apart from clearly false advertising, a failure to qualify promises or predictions and other like conduct on the part of a real estate agent or a vendor may in the particular circumstances of the case cause confusion and contravene s 18 of the Australian Consumer Law. The case law that exists in relation to s 52 remains instructive as to the acceptable norms of behaviour.

In addition, s 30 of the Australian Consumer Law[16] prohibits misleading and deceptive conduct by a person in connection with the sale of grant of a possible sale or grant of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land. Specifically, s 30 precludes misleading and deceptive representations in relation to sponsorship, approval or affiliation, the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, use of the land and the existence or availability of facilities associated with the land. The significance of s 53A of the Trade Practices Act and s 30 of the Australian Consumer Law is that they are not subject to the proportionate liability.[17]

The significance of silence

In *Demagogue Pty Ltd v Ramensky*,[18] the Full Federal Court found that silence can be considered misleading or deceptive in certain circumstances. Black CJ held:

> Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.[19]

While a vendor has no common law obligation to disclose defects in quality, the circumstances may be such that he or she would be guilty of misleading and deceptive conduct if they maintained their silence in relation to the defect in quality. This however does not necessitate an inquiry as to whether there is an independent duty to disclose.[20] Silence can be misleading even where there is no duty to disclose at common law or in equity. Silence can be misleading as a result of the particular circumstances of the case.

In *Demagogue*, the purchasers were shown the site of a proposed development. To get to the property from the main road, the purchasers

15 Australian Consumer Law s 19.

16 Formerly Trade Practices Act 1974 (Cth) s 53A.

17 Section 34 of the Civil Liability Act 2002 expressly defines an apportionable claim to include a claim for economic loss or an action for damages under the Australian Consumer Law for a contravention of s 18 of the Australian Consumer Law. There is no reference to s 30 of the Australian Consumer Law.

18 (1992) 39 FCR 31; 110 ALR 608; (1993) ATPR 41-203; BC9203831.

19 Ibid, at FCR 32.

20 *Demagogue v Ramensky*, ibid, and *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84; Aust Torts Reports 81-111; (1991) ASC 56-053; ATPR 41-103.

walked through steeply sloping land covered in vegetation and bearing rough 4-wheel drive sand tracks. When the purchaser asked about access to the property, the real estate agent said: 'Well, look, of course there will be access. The developer will build a driveway up to the road.' After the inspection, the real agent showed the purchasers a copy of the plan of the development which depicted a driveway. The purchasers were not told that the driveway was not within the boundaries of the property. The vendor had not disclosed that a road licence was required before a driveway could be constructed and that there were various restrictions in relation to the road licence and who it could be transferred to. The court was satisfied that if the purchasers had known of the various restrictions, they would not have entered into the contract. The vendors were held to have been guilty of misleading and deceptive conduct and the remedy of rescission was granted.

The case of *Vitek v Estate Homes Pty Ltd*,[21] discussed in detail below is also instructive on this issue. It was held in *Vitek* that the vendor had not been guilty of misleading and deceptive conduct in the circumstances.

Section 55A(2) of the Conveyancing Act

As a result of legislative constraints introduced to prevent gazumping, since 1986, a vendor of residential property has to prepare a contract that discloses certain information about the property that they are putting up for sale. The effect of s 52A of the Conveyancing Act and the most recent Conveyancing (Sale of Land) Regulations 2010 which came into force on 1 September 2010, in conjunction with s 66R of the Conveyancing Act, means that for residential and commercial property[22] a vendor must prepare a form of contract containing all the annexures referred to in s 52A at the time that the land is first offered for sale.

While there has been some amendments to the headings of some of the clauses of the 2010 Regulations, the substance of the Conveyancing (Sale of Land) Regulations 2010 is predominantly the same as the Conveyancing (Sale of Land) Regulations 2005 (which had a built in sunset clause and was automatically repealed in 2010). The main difference seems to be that there is now an obligation to include a warning about swimming pools in the contract for sale to the effect that a purchaser is advised to ensure that the swimming pool on the subject property complies with the requirements of the Swimming Pools Act 1992 (NSW).

The mechanics of vendor disclosure legislation

Section 52A(2) provides:

> A vendor under a contract for the sale of land:
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> (a) shall, before the contract is signed by or on behalf of the purchaser, attach to the contract such documents, or copies of such documents, as may be prescribed, and
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> (b) shall be deemed to have included in the contract such terms, conditions and warranties as may be prescribed.

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21 [2010] NSWSC 237; BC201001788.

22 Subject to some exceptions: Conveyancing (Sale of Land) Regulations 2010 (NSW) cl 10.

The types of documents and disclosures that must be included in the contract under s 52A fall into three categories. These categories are prescribed documents,[23] prescribed warranties[24] and implied warranties which refers to information which results in the vendor making a specific disclosure in the contract in relation to a term, condition or warranty pursuant to s 52A(2)(b) of the Conveyancing Act.

Schedule 2 to the Conveyancing (Sale of Land) Regulation 2010 sets out the prescribed terms to the contract. Clause 1 of Sch 2 deals with objections and requisitions to encroachments. Clause 2 deals with encroachments in the context of strata units bought off the plan. Clause 3 deals with the requirement for a vendor to serve at least 14 days before completion an occupation certificate within the meaning of the Environmental Planning and Assessment Act 1979 (NSW) for land and house purchases.

The vendor's obligations under s 52A(2) cannot be excluded under the contract. Arising from the Conveyancing Act, the remedies available to a purchaser if a vendor is in breach of its obligations under s 52A(2) are rescission and the repayment of the deposit.

If the purchaser's right to rescind arises from the vendor's failure to attach the prescribed documents, the purchaser has the right to rescind the contract by notice in writing served on the vendor at any time within 14 days after the making of the contract, unless the contract has been completed.

If the purchaser's right to rescind arises from the vendor's breach of the prescribed warranty, then the purchaser has the right to rescind the contract by notice in writing served on the vendor at any time before the contract is completed.[25]

The rescission of the contract does not render the vendor liable to pay to the purchaser, or the purchaser liable to pay to the vendor, any sum for damages,

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23 Schedule 1 of the Conveyancing (Sale of Land) Regulation 2010 (NSW).

24 Schedule 3 of the Conveyancing (Sale of Land) Regulation 2010 (NSW). The prescribed warranties are to the effect that as at the date of the contract and except as disclosed in the contract: the land is not subject to any adverse affectation ('subject to an adverse affectation' is defined in Pt 3 of Sch 3 and mirror to a large extent the matters that must be disclosed in a s 149 certificate. Schedule 4 to the Environmental Planning and Assessment Regulation 2000 (NSW) sets out the contents of a s 149(2) Environmental Planning and Assessment Act 1979 (NSW) Certificate. A planning certificate must also include advice about any exemption under s 23 or authorisation under s 24 of the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 (NSW) and if the council has been provided with a copy of the exemption or authorisation by the Coordinator General under that Act); the land does not contain any part of a sewer belonging to a recognised sewerage authority; the s 149 certificate attached to the contract specifies the true status of the land the subject of the contract in relation to the matters set out in Sch 4 to the Environmental Planning and Assessment Regulation 2000; there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any upgrading or demolition order or, if there is such a matter, a building certificate has been issued in relation to the building or structure since the matter arose; if the land is burdened or purports to be burdened by a positive covenant imposed under Div 4 of Pt 6 to the Conveyancing Act, no amount is payable under s 88F of that Act in respect of the land; the land is not subject to an annual charge for the provision of coastal protection services under the Local Government Act 1993 (NSW). 'Subject to an adverse affectation' is defined in Pt 3 of Sch 3 and mirror to a large extent the matters that must be disclosed in a s 149 certificate.

25 Regulation 17 of the Conveyancing (Sale of Land) Regulation 2010.

costs or expenses. However, the vendor or purchaser is still entitled to any damages, costs or expenses payable arising out of a breach of any of the terms or conditions or warranty contained in the contract. It also does not affect the entitlement for any adjustments between the vendor and purchaser who has received the benefit of possession of the land or the reimbursement of the purchaser for expenses incurred by the purchaser in complying with the requirements of any order, direction or notice in connection with the land.[26]

Interestingly, the vendor is under no obligation to disclose fire safety orders issued pursuant to O 6 of s 121B of the Environmental Planning and Assessment Act 1979 (NSW). This is surprising because compliance with fire safety orders can run into the hundreds of thousands of dollars for commercial buildings.

How the legislation works in practice

The following discussion illustrates how far the concept of caveat emptor has been watered down by the Trade Practices Act and s 55A(2) of the Conveyancing Act.

Contaminated land

In *Vitek v Estate Homes Pty Ltd*,[27] the purchasers purported to rescind the contract for sale for breach of warranties implied in the contract by s 52A of the Conveyancing Act in that the s 149 certificate failed to specify the true status of the land in relation to matters set out in Sch 4 of the Environmental Planning and Assessment Regulation 1994 (NSW). In particular, that the land was affected by a policy within s 7 of the s 149 certificate and was contaminated land. The s 149 certificate annexed to the contract stated that the land was not affected by a policy within s 7 of the s 149 certificate and that the land was not contaminated. The proceedings also involved a claim against the lawyers for the purchasers but the article will not concentrate upon that aspect of the case.

The land had been formerly used as a service station and the vendors had obtained, in connection with their various development proposals in preceding years, a report from Douglas & Partners dated July 2001 entitled 'Report on Preliminary Contamination Assessment, 591 Elizabeth Street, Redfern'. It was concluded in the executive summary of that report that:

> contamination issues arising from fuel spillages across the site would be minimal as the site is completely sealed by concrete slab. . . . On the basis of site observations and information available on the subject site, it is considered unlikely that the proposed minor underground extension/alteration to the current building will render the site unsuitable for continued commercial/industrial use or result in unacceptable exposure to contamination which may be present in the subsoil.

The scope of the report had not included an assessment of whether there had been subsurface contamination from the underground storage tanks.

When this report was submitted to the council as part of an application to amend the development consent that had been granted earlier in 1992 for

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26 Regulation 18 of the Conveyancing (Sale of Land) Regulation 2010.
27 [2010] NSWSC 237; BC201001788.

workshop changes and the construction of a caretaker's flat on the roof of the premises, the council wrote back and said that the report was inadequate as it did not establish the suitability of the site for residential use and did not establish whether the fuel storage tanks had been decommissioned in accordance with NSW WorkCover requirements. The council identified the need for a hazard risk assessment which clearly identified potential site hazards to human health and safety.

The vendors complied with their obligations pursuant to the Contaminated Land Management Act 1997 (NSW) (the Act) as it related to the content of a s 149 certificate. They warranted several matters concerning the effect of the Act: that the property was not within the declared investigation area or remediation site under Pt 3 of the Act, that the land was not subject to an investigation order or remediation order within the meaning of the Act, that the property was not subject to a voluntary investigation proposal under the Act and that it was not subject to a site audit statement under Pt 4 of the Act. The vendors also disclosed to the purchasers the representation by the council that the development control plan on contaminated land adopted by the council on 17 July 2000 might restrict the development of the land and that consideration of this development control plan and the implications of provisions under the relevant state legislation was warranted.

The issue in this case was whether the information included in the s 149 certificate entailed representations by the vendors to the effect that to the knowledge of the vendors:

a) The land was not actually or possibly contaminated land for the purposes of the council's development and control plan concerning contaminated land in Pt 2 of the Act; and
b) The vendors were not aware that there were questions about contamination and that those questions would most likely have to be addressed and dealt with if any application for consent for residential development or use were pursued.

The court accepted that the vendors knew that the development application contemplated by the contract would, with virtual certainty, prompt from the council responses regarding possible contamination of the kind they had themselves encountered when they attempted to obtain consent to the addition of residential premises on an upper storey.

In considering whether there had been misleading and deceptive conduct, the court found it critical that the contract contained a special condition by which the purchaser had effectively warranted that it had inspected the property and acknowledged that it took the property with all defects, latent and patent. The contractual framework was in that way one that put the purchasers on notice that it had a responsibility to look out for its own interests. The vendor had also not engaged in extensive discussions with a potential purchaser to point out comprehensively the advantages of the site for the purchaser's purposes. While the vendor and the purchaser had some brief discussions about the purchaser's plans for the site, the vendor did not set out in any way to assist or enable the purchaser to make an informed decision as to whether or not it was feasible to achieve the kind of development that the purchaser had in mind. All the vendor had done was make some comment

about the floor space ratio that might be achievable and people who might help with approaches to the council.

The vendor had also offered the purchaser details of the development consent he had himself obtained. The discussions were entirely at arms length in which the vendor was no more than a vendor willing to negotiate wholly in his own interest. While the vendor had told the purchaser of the former petrol station use, the circumstances were not such as to justify the holding by the purchaser of any expectation that the vendors would volunteer the limited additional information they had about the contamination potential, obtained from their own dealings with the council. The vendors had done nothing in this case to justify the holding by the purchaser of any expectation higher than content of the contractual warranties, including those implied by the sale of land legislation. The purchaser therefore failed in its action against the vendor.

Flood related development controls

In *Hijazi v Raptis*,[28] the purchaser rescinded the contract to buy land as a result of non-disclosure of council policy on flood-prone land. The s 149 certificate under the Environmental Planning and Assessment Act stated that the council had not adopted a policy to restrict development of the land by reason of the risk of flooding. The fact that the land was subject to the Rockdale City Council Local Environmental Plan 2000 (LEP) was not disclosed. In particular, cl 20 of that LEP provided that a person could not erect a building or carry out work on flood-prone land without development consent. It enabled the council, as a condition of consent, to require the floor level of the building to be at a height sufficient to prevent or reduce the incidence of flooding. The vendor's solicitor was in possession of a letter written by the council which detailed the building restrictions on the land. This letter had not been provided to the purchasers.

Gzell J held that the incorrect statement in the s 149 certificate constituted a breach of the statutory warranty pursuant to s 52A of the Conveyancing Act which entitled the purchaser to validly rescind the contract.

By contrast, a strict construction of the relevant legislation can lead to an unjust result. In *Jones v Scherle*[29] the issue was whether the failure of the vendor to disclose that the land was adversely affected by declaration concerning flooding which had been notified in the NSW Government Gazette of 15 June 1923 pursuant to s 55 of the Public Health Act 1902 (NSW) was an undisclosed affectation which could not be remedied thereby entitling the purchaser to rescind the contract.

A complication for the purchaser was that at the date of the contract the Public Health Act had been repealed and replaced by the Unhealthy Building Land Act 1990 (NSW). The transitional provisions provided that any declaration under the Public Health Act took effect as a notice under s 5 of the Unhealthy Building Land Act. However, the statutory warranty pursuant to s 52A of the Conveyancing Act was not changed to refer to the latest scheme until 1995. Therefore, although the affectation was not disclosed by the vendor, on a strict reading of the regulations, no breach had occurred.

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28 (2002) 11 BPR 20,487; [2003] ANZ ConvR 146; [2002] NSWSC 499; BC200203088.
29 (1998) 9 BPR 17,005.

Windeyer J felt hamstrung by the anomaly and powerless to infer that the reference to the Public Health Act in the regulations enforced at the time was intended to be a reference to the Unhealthy Building Land Act. His Honour held that this was perhaps an unfortunate result for the plaintiffs but the terms of the regulation were clear, with the result that the purchasers had no right to rescind and have their deposit returned.

It also appears that the purchasers would have failed in any event as they had failed to lead any evidence before the court as to the extent of work required to raise the surface of the land to the required level or as to the cost of such work to enable the court to make an assessment as to whether the failure to disclose the affectation constituted a defect in title.

Road widening

In *CH Real Estate Pty Limited (t/as Raine & Horne Commercial Penrith) v Jain Ran Pty Ltd*[30] the Court of Appeal had to consider whether a purchaser was entitled to rescind the contract as a result of the failure by the vendor to disclose a road widening proposal. The contract was for the sale of a service station and convenience store. Also attached to the contract of sale were standard requisitions and answers, including the requisition 'is the vendor aware of any contemplated or current legal proceedings which might or will affect the property?' answered in the negative. The vendor had not disclosed that there were legal proceedings brought by the tenant against the vendor, claiming that the agreement for lease had been entered into as a result of misrepresentation and seeking damages including 'rent and outgoings due under the lease'. The advertising brochure distributed by Raine & Horne also stated that the land was an 'outstanding investment' with a 'twenty year lease' and 'net income $257,200 per annum'. The tenant was described as a 'highly experienced operator' and the investment as 'great opportunity for long-term security and income'.

The Court of Appeal held that the advertising brochure and non-disclosure of the road widening proposal involved misrepresentations which entitled the purchaser to rescind and to recover the deposit.

The Court of Appeal also affirmed the trial judge's decision that the purchaser was entitled to rescind the contract due to a breach of the implied statutory warranties pursuant to s 52A of the Conveyancing Act. The Court of Appeal affirmed the trial judge's findings that the road widening proposal affected the land and the evidence of the purchaser that if they had been aware of the existence of the road widening proposal, that they would not have entered into the contract. The trial judge found that the significance of the road widening proposal was found in a clause of the lease between the tenant and the vendor which contained a break clause on resumption of the land. The trial judge found that people who own or lease service stations do not want slices taken off their frontages for road widening. They do not want to lose one-twentieth of their land at the busiest part and they do not want to deal with a resuming authority. In the trial judge's opinion, there could be no doubt of the materiality and importance of the road widening proposal. If it had been known, the trial judge found that the probabilities were that no contract would

30 (2010) 14 BPR 27,361; [2010] NSWCA 37; BC201001890.

have been made at all or that it would have been made on re-negotiated terms with the assistance of an expert's report on its commercial implications.

In relation to the failure to disclose the litigation on foot between the tenant and the vendor, the Court of Appeal was split on this issue. Basten JA held that the answer to the requisition concerning legal proceedings was not false since a claim for damages against the vendor had no direct affect on the property. The majority, however, held that the answer to the requisition concerning legal proceedings was false which, even if it was innocent, entitled the purchaser to rescind.

Timanu Pty Ltd v Clurstock Pty Ltd[31] is also instructive on this issue. In *Timanu*, it was held that a local council policy which stated that a condition for subdivision or consent was the dedication of land for road widening purposes imposed a limitation on the vendor's rights of ownership such that the land was 'affected' by road widening. In coming to that conclusion, Kirby P, with whom the rest of the Court of Appeal agreed, referred to the judgment of Powell J in *Little v Piccin*[32] in which his Honour had set out a two-prong test to determine whether a property is relevantly affected. In determining whether the property is relevantly affected, the potential factual and legal effect of the enumerated matters is considered.[33]

The local council policy in this case was a direct burden on the subject land and Kirby P was satisfied that it was no less so a burden on the property because certain steps remained to be taken to convert the affecting policy into a specific limitation on the particular land in question.

Whether land reserved for acquisition by a public authority

In *Kobol Holdings Pty Ltd v Johnson*,[34] it was held that a written statement of the Electricity Commission to the effect that the land lay within an area under investigation for a high voltage line proposed to be constructed and, at that stage of enquiry, the land was affected by one of the alternative routes but the routes under examination were not fixed and would continue to be subject to modification did not constitute a 'proposal' of the kind referred to in cl 12 of the standard contract for sale or the deemed warranty pursuant to s 52A(2)(b) of the Conveyancing Act and cl 5(1) of the Conveyancing (Vendor Disclosure and Warranty) Regulations 1986. As a result, it was held that the purchaser was not entitled to rescind the contract.

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31 (1988) 15 NSWLR 338; 67 LGRA 360; 4 BPR 9354; NSW ConvR 55-444.

32 (1983) 52 LGRA 258 at 274; NSW ConvR 55-152.

33 Powell J held that:

1. A property is relevantly 'affected' if one of the enumerated matters has — as in the case of a prescribed scheme, or residential district proclamation — an effect in law or in fact, or would — as in the case of a prepared, but not prescribed, scheme, or a road proposal — if certain steps were taken, have an effect in law or fact;
2. A property is not relevantly affected unless the actual or potential effect of the particular one of the enumerated factors is a legal or factual prohibition of, or limitation upon, what, subject to any limitations imposed by the general law, would otherwise be the rights of the owner for the time being to alienate, or to use, the subject matter of the contract in any manner which he saw fit.

34 [1987] ANZ ConvR 137; BC8701482.

Other risk to the land

In *Mandalidis v Artline*,[35] the purchaser had entered into a contract for the purchase of a warehouse and office building situation near Sydney Airport. The s 149 certificate annexed to the contract included the answer 'no' for the following question:

> Whether or not the land is affected by any Council policy to restrict development by reason of land slip, bush fire, flooding, tidal inundation, subsidence or any other risk.

After exchange, the purchaser's solicitors obtained a fresh s 149 certificate which now answered 'yes' to the same question and referred to the local council's 'policy on aircraft noise'. That policy had been adopted and amended prior to the exchange of contract. Under the policy, there was a risk that a development or building could be subject to deferred commencement consent because of standards regarding aircraft noise. Austin J held that the existence of a council policy under which there is a risk that a development or building application may be subject to 'deferred commencement consent' because of standards regarding aircraft noise was a matter about which a reasonable purchaser would wish to be informed. The word 'risk' was held to be wide enough on its literal construction to include the risk to which the council's policy on aircraft noise related. The vendor was therefore in breach of s 55A of the Conveyancing Act and the purchaser had validly rescinded the contract.

Non disclosure of relevant development control plan

In *Verman v McLaughlin*,[36] it was held that the non-disclosure of a development control plan which had been adopted but was not yet in force was a matter that affected the land. The plan imposed restrictions on use of the premises for professional consulting rooms. There was no suggestion that the purchasers themselves wanted to establish such rooms. The court held that the contract had been validly rescinded and ordered the deposit to be repaid.

Incorrect description of zoning of the land

In *Argy v Blunts*,[37] the plaintiffs had decided to buy a waterfront residential property. The advertising brochure produced by the real estate agent claimed that the property had 'unlimited potential' and stated it was zoned residential 2A. This was not true. The s 149 certificate described the land as zoned residential 2A, part 'regional open space reservation C' and that the land was affected by a 'residential zones development control plan'. Unfortunately, the copy of the s 149 certificate that was faxed to the plaintiffs was incomplete in that the page which explained what 'regional open space reservation C' entailed was omitted. On the day before the auction, the real estate agent ran an advertisement in the newspaper which described the property as 'craves development — a court, a pool or an imaginative home'.

At some point after exchange, Mr Argy realised the significance of the

35 (1999) 47 NSWLR 568; 9 BPR 16,845; [1999] NSWSC 909; BC9905743.
36 (1990) 70 LGRA 19; [1990] ANZ ConvR 357; (1990) NSW ConvR 55-521; BC90002579.
37 (1990) 26 FCR 112; 94 ALR 719; [1990] ANZ ConvR 137; ASC 55-963.

missing page and its potential impact on his future development plans and, in particular, his desire to install an inclinator device from the house to the boatshed, as well as possibly seriously limiting the waterfront facilities that Mr Argy had intended to install. Mr Argy did not purport to rescind the contract, but instead tried to negotiate a decrease in the purchase price of $400,000. Mr Argy also proceeded to arrange finance for the purchase.

The plaintiffs sued the vendor, the real estate agent and the solicitors for misleading and deceptive conduct under the Trade Practices Act and the Fair Trading Act. There was also a claim against the vendor for breach of s 52A of the Conveyancing Act.

The court held that the real estate agent had engaged in misleading and deceptive conduct by virtue of the combined effect of the brochure and the advertisement placed in the newspaper the day before the date of the auction and that the lawyers were engaged in misleading and deceptive conduct in the sense that the contract prepared by them could be seen to be a statement of representation made by them as the persons responsible for the preparation of the contract that the s 149 certificate annexed thereto was so far as relevant to the land the subject of it, a copy of the complete certificate as issued by the council. The court found that the plaintiffs had been induced by the misrepresentations of the real estate agent to enter the contract and that the effect of those misrepresentations had not been lost by Mr Argy's cursory perusal of the contract. The court also found that the plaintiffs had been induced by the misrepresentation of the solicitor to the effect that the certificate annexed to the contract was the complete certificate as issued by the council, to enter the contract notwithstanding that had Mr Argy diligently attended to his own interest, the falsity of the representation would have been discovered by him.

The court also found that the land was affected other than as set out in the incomplete certificate, although of course it was rightly described as reservation 9(C). There would therefore appear to have been a breach of the statutory warranty pursuant to s 52A of the Conveyancing Act that would have entitled the purchaser to rescind the contract and to have the deposit refunded. However the court held that no damages were payable by one side to the other. The court found that the plaintiffs had not at the end of the day established that they had suffered any substantial loss. The victory by the plaintiffs appears therefore to have been hollow at best.

Building without approval

In *Marinkovic v Pat McGrath Engineering Pty Ltd*,[38] the issue was whether the existence of a mezzanine level erected in a factory building without local government approval was a matter that was caught by cl 1 of the Conveyancing (Sale of Land) Regulation 2000.[39]

Campbell J held that the existence of the mezzanine floor without local government approval was such a matter and that the purchaser had validly rescinded the contract when the vendor had not responded to the purchaser's

38 (2004) 61 NSWLR 150; 12 BPR 22,161; [2004] NSWSC 571; BC200404324.
39 (1997) 8 BPR 15,765; NSW ConvR 55-852; BC9706884.

enquiry as to whether the mezzanine level of the building had been constructed with council approval.

Incorrect description of vendor's title

In *Wongala Holdings Pty Ltd v Beynon*[40] there were errors in the description of the vendor's title in the contract of sale. The errors ranged from misspelling of parish names to incorrect deposited plan numbers. The s 149 certificate annexed to the contract also repeated the errors in the title description. The court held that while the vendor had an obligation to have the errors corrected and a claim for rectification of the contract if made would have been difficult to resist, there had been no breach of the statutory warranty under s 52A of the Conveyancing Act since the land contracted to be sold was not affected in a way not disclosed in the contract.

Conclusion

A conveyancing transaction has many hidden traps and pitfalls and for that reason it has always been important that a purchaser retain the services of a competent conveyancer to ensure that the hidden traps and pitfalls are addressed.[41]

It is clear that the vendor disclosure obligations pursuant to s 52A of the Conveyancing Act have significantly watered down the historical approach to real estate transactions of 'let the buyer beware'. In addition, a vendor and their agents also have to be careful not to engage in misleading and deceptive conduct contrary to the provisions of s 18 of the Australian Consumer Law 2010 (Cth).

However, it remains important for a prudent purchaser to engage the services of a competent conveyancer. This is particularly so because the remedy for non-disclosure of rescission and a return of the deposit, without resort to litigation, is lost on completion of the contract. A competent conveyancer can be the difference between a purchaser who is properly advised of their rights in relation to the contract for sale so as to enable them to exercise their right of rescission to relieve them of a potentially improvident transaction and one who is saddled with a property that is less than desirable.[42] Although the purchaser retains the right to sue the vendor for damages for breach of contract and for misleading and deceptive conduct, such a course is expensive, time-consuming and generally not a recommended course of action.

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40 Conveyancing (Sale of Land) Regulation 2000 (NSW) Sch 3 Pt 1 subcl (d) provides that 'there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any upgrading or demolition order or, if there is such a matter, a building certificate has issued in relation to the building or structure since the matter arose'.

41 L Chan, 'When Conveyances go wrong' [July 2009] *Australian Property Investor* 50.

42 There are of course no guarantees that the retainer of a conveyancer will protect the rights of the purchaser. This is illustrated by the case of *Liberty Grove (Concord) Pty Ltd v Yeo* (2006) 12 BPR 23,709; [2006] NSWSC 1373; BC200610787 where the rights of the purchaser were inadvertently waived.