

## Off-the-plan sales – representations about size

“The Lido” is a 5 storey apartment building in Hampton, a bayside suburb of Melbourne. Apartments in the building were sold off the plan in 2011, the building was built, and most purchasers settled shortly after completion in November 2012.

One purchaser, however, refused to settle, terminated the contract, and sued the developer for the return of her deposit. Her case - *Birch v Robek* [2014] VCC 68 - was decided by the County Court of Victoria on 27 February 2014.

The facts of the case were:

- Ms Birch was a 24 year old flight attendant. She had saved \$40,000 while living with her parents to buy her own apartment. This was her first property purchase.
- Ms Birch was looking for an apartment with an area over 40m<sup>2</sup> internally, because banks would lend 80% or more only on apartments over this size.
- When investigating “The Lido”, Ms Booth was handed a marketing brochure showing a plan of Apartment 205, giving an internal area of 40.5m<sup>2</sup>. The price of the apartment was \$359,000.
- The contract annexed architectural plans containing a table showing the area of Apartment 205 as 40.5m<sup>2</sup>, and a plan of subdivision indicating “interior face” boundaries.
- Ms Birch signed the contract without reading it closely, and paid the deposit of \$35,900. Before the end of the 3 day cooling off period she examined the contract plans carefully with a magnifying glass to make sure they matched the brochure. She was satisfied that they did.
- The apartments were built and settlement was requested in November 2012. Ms Birch’s bank valued the apartment at \$330,000, with the valuer indicating that the living space in the apartment was 32m<sup>2</sup>. Because the apartment was less than 40m<sup>2</sup>, the bank refused to finance to 80%.
- When Ms Birch inspected the apartment she thought it was so small as to be unliveable, and smaller than hotels she stayed in when travelling as a flight attendant.
- Ms Birch terminated the contract and sued for the deposit. The developer later sold the apartment for \$265,000, and counterclaimed for the shortfall between that and the contracted price.

### How did an apartment shown by plans to be 40.5m<sup>2</sup> come to have an area of only 32m<sup>2</sup> when built?

Architects prepare their plans calculating areas to the midpoint of common walls. This method is in accordance with guidelines issued by the Property Council of Australia. The architectural plans for the Lido were prepared on this basis. The measurements in the marketing brochure were obtained from the architectural plans, giving the same area.

However, as is typical in high-rise developments, the plan of subdivision provided for interior face boundaries. This means that the owner of the apartment has title to the area bounded by the internal surface of common walls. The difference between the area measured to the midpoint and the area measured to the interior face of common walls can be substantial. In the case of Apartment 205 at the Lido, the difference in area was about 12%.

### The result?

While caveat emptor or “buyer beware” is still extremely important in the purchase of property, the common law does provide some protection to purchasers. In *Flight v Booth* (1834) 131 ER 1160, for instance, it was held that where a misdescription is so significant that the purchaser would never have entered the contract if he or she had known the true nature of the property, the contract can be avoided altogether.

## Off-the-plan sales – representations about size *(...continued)*

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In *Birch*, the Court was satisfied that Ms Birch would not have entered the contract had she known the true internal area of the apartment, and she was therefore entitled to rescind at common law. By representing in the marketing brochure that the apartment would have an internal area of 40.5m<sup>2</sup>, the developer was also found to have engaged in misleading and deceptive conduct contrary to the Australian Consumer Law, which Ms Birch relied on.

A disclaimer in the marketing brochure and extensive provisions in the contract attempting to protect the developer did not help the developer in these circumstances.

The Court ordered repayment of the deposit.

### **The lessons?**

When marketing sales off-the-plan, developers and their consultants must be aware of the different methodologies in the preparation of architectural plans and plans of subdivision.

Representations in marketing materials about the size of apartments must be considered carefully.

Architectural plans will not necessarily indicate what area a purchaser is buying.

What the purchaser is buying is determined by the plan of subdivision. Purchasers must be very careful about area when buying off the plan. *Caveat emptor* (with limits).

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