

OCTOBER 2012

“Optimism is fine...

False and Misleading Statements by Agents

In two recent decisions, both decided on 17 September 2012, the actions of agents and developers in trying to lease new retail centres under development were accused of being false and misleading. Both agents presented optimistic views of how the centre would look when the development was complete. Both turned out to be incorrect, and the development was not leased as had been represented by the agents. The cases were decided in opposite ways. Both cases are good examples of what behaviour is acceptable when marketing a new development, and what is false and misleading.

In the **Foundry case** (Miletich v Murchie [2012] FCA 1013), the agent was found to have made false and misleading statements. An order for damages was made against the agency, the agent personally, the developer company and the director of the developer personally. The orders were made against the individuals because they were knowingly concerned in the contraventions.

In the **Portico Plaza case** (North East Developments Pty Ltd v Business To all Australia Pty Ltd [2012] NSWADT 188) the agent was found to have merely been optimistic, and was not guilty of being false and misleading.

What were the differences?

In the **Portico Plaza case**, the agent thought that what he was representing was true, and had a reasonable basis for considering it to be true; in **the Foundry** case the agent could not have reasonably considered that the representations were true.

The Foundry

This case was about the marketing of a new centre in Melbourne's CBD called the Foundry.

To attract potential tenants, the agency and developer created glossy plans, a video, a brochure, and a computer simulation of the completed centre showing specific tenants and customers.

The agent and the developer met the lessee at the Foundry site in a suite set up to entertain potential lessees. There were large plans in the suite and the agent pointed to individual shops and stated things like:

- "that one would sell sushi and that one would be a chemist";
- pointed to shops around the one proposed for this lessee and stated "one that was to be a hairdresser, one that was to be a ticketek kiosk, one that was to be a newsagency as well as a juice bar, a bar and a café, an optometrist and a continental café";
- he stated that there would be a sporting retail outlet, either a Rebel Sport or a gymnasium, and a Drummond Golf Store in the basement.

Later, the lessee and its franchisee went on a walking tour of the development site. Again, the agent pointed out specific shops and described the nature of each of them. He indicated an Irish Bar, a gift shop, hairdresser and a florist. He again referred to the basement level including a gym, a sporting complex and Drummond Golf. Further through the development site he pointed out a newsagent, a chemist shop and some of the food sites.

A disclosure statement was issued, which stated "on completion it is estimated that there will be 40 premises available for leasing in the Centre". It listed the tenancy mix as "womens fashion, mens fashion, specialities, cafes, supermarkets...".

In fact; prior to the initial meetings between the agent and this tenant, the agent had received an email from the developer who expressed concern about the lack of progress in negotiation with prospective tenants. The developer referred to a growing "exhausted" list and a very thin list of back-up prospects. The developer expressed the view to the agent that "it is hard to see how we will meet the leasing targets." The lessee was also able to present evidence showing that deals had fallen through and which also showed that the agent and developer could not reasonably have considered their representations to be true.

The Court could not accept that the agent or the developer could have any reasonable basis to consider their representations as true. The material created to entice tenants to the new centre may have been merely optimistic when it was created, however it had become false and misleading. And the agent and developer could not reasonably continue to believe in the original vision.

When the Foundry opened there were only three shops opened. There was no newsagency, no Irish Bar, no chemist, no restaurant of any kind, no Drummond Golf Shop, no gymnasium and no sporting goods outlet.

The developer subsequently went into liquidation.

Portico Plaza

Portico Plaza was also a new centre development.

The Centre Manager generally represented that he would provide "a viable shopping centre". The specific statements made by the centre manager included:

- "I have already have had (sic) a few potential newsagency tenants making enquiries to open a newsagency but I would like you to offer you (sic) to open a newsagency but I would like to offer you the opportunity to re-open because you already have a lease with North East Developments Pty Ltd and the newsagency could be re-opened at any time"
- "I am a very experienced Centre Manager and I have been in this field for over 10 years and

have managed the Centre size as Westfields (sic)"

- "I am very confident that Portico Plaza will not stay vacant for very long as I already have a list of people ready to sign up"
- "the butcher will re-open the butcher shop and a bakery will open in a space between Woolworths and the butcher and also Harris Farm fresh fruit market and CBA possible will open next door to us and a Best and Less kind of department store is looking to open"
- "a chemist and a medical centre will open up along each other, Sanity store will open as well as a hair dressing business. A noodle bar and Subway has already had a shop fit out and will open up in the food court very soon, and a tobacconist will open next to you soon"
- so with all these businesses going in the centre it will be more than 65% occupancy level as promised to you and I am confident that rest of the space will fill up very quickly"
- "a few new tenants have signed being a chemist, Australia Post, Florist, butcher and Indian Grocery and there are also some potential tenants such as CBA Bank, Electrical White goods, Liquor Store, Hair dresser and Green Grocer which I believe will be Harris Farm"
- "I am not supposed to tell you this but please keep this confidential a very large department store Dimmey's has signed to take the lease and has taken all the space upstairs level above your shop starting from next to Woolworths extending all the way to the food court"

When Portico Plaza opened there were only four shops (out of approximately 50 premises) opened.

There was no butcher, no Woolworths, no Harris Farm, no bank, and no department store.

The developer subsequently went into liquidation

The Tribunal accepted evidence that the statements were made, however found that they not were false or misleading. The Tribunal thought that his "expression of confidence may have been optimistic, but... could not be categorised as false or misleading in the absence of evidence that he did not hold or had no reasonable basis for holding an optimistic view." The Tribunal accepted evidence that showed that the centre manager had a reasonable basis for considering the representations to be true. The centre

manager was then in actual negotiations with numerous potential tenants, some of which were in an advanced state. No evidence was presented by the lessee to contradict that position.

Summary

While these two cases result in opposite decisions, the reasoning is the same:

- If the agent considers the representation to be true; and
- there is a reasonable basis to consider it to be true (which can later be backed up by evidence in a Court or Tribunal);

then, the representation is not a false or misleading statement, even if it turns out to be incorrect.

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