NEW SOUTH WALES - Supreme Court

Street v Luna Park Sydney Pty Ltd [2009] NSWSC 1

By Camilla Charlton (Senior Associate Henry Davis York)

Luna Park gives developers a free ride

What happens when you state something in a development application and the end result is different? In the recent case of *Street v Luna Park Sydney Pty Ltd* [2009] NSWSC, the NSW Supreme Court held that a developer was not liable to residents, under either the *Trade Practices Act* 1974 (TPA) or for negligent misrepresentation, in respect of statements made in a development application as to its proposed intentions for development. The statements made did not represent the final development.

The facts

In 2001 and 2002, Metro Edgley Pty Ltd (Metro) lodged a staged development application for the construction of rides and playgrounds at the Luna Park Entertainment Complex. The 2001 Stage 1 Development Application (2001 DA) sought consent for (among other things) the construction of a safe enclosed "children's rides" area. The 2002 Stage 2 Development Application (2002 DA) sought specific consent for the location and operation of two rides, known as the "Ranger" and the "Octopus", on the Northern Extension. The nature of these rides was not specified. However, according to the drawings attached to the 2002 DA, they were to be located in an area labelled "Children's Rides".

What were in fact constructed were "adult thrill rides".

The plaintiffs, being predominantly residents in the vicinity of Luna Park, sought an injunction to stop the adult thrill rides from operating and claimed damages for loss in value of their properties.

Claim under s 52 of the TPA

Section s 52 (1) of the TPA states that *"a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive"*.

The Court held that the statements made by Metro in the 2001 DA and the 2002 DA were not misleading or deceptive. Brereton J. noted that *"lodging a development application does not import a representation that the applicant will undertake the development in question if consent is granted"*. Accordingly, the statements contained in the 2001 DA and the 2002 DA were not representations as to what would happen if they were approved but rather a description of the activities for which permission was sought.

In order to bring a successful claim under s 52 of the TPA, the conduct complained of must have been undertaken "in trade or commerce". For conduct to be characterised as being "in trade or commerce", that conduct must be directed towards persons with whom there is a potential trading or commercial dealing or relationship.

The Court considered that there was no potential for trading or commercial dealings to occur between Metro and the plaintiffs. Lodging development applications and/or making statements regarding the intended development were simply not commercial activities.

To establish a breach of s 52 of the TPA, a plaintiff must establish that it was the intention (determined objectively) of the defendant that the plaintiff would rely on the representations made and that those representations were directed at the plaintiff. This was held not to be the case in these circumstances. Development applications are not "directed" to residents and are provided to them only so that they may object to the development proposed. As neither the 2001 DA nor the 2002 DA were directed to the residents, nor was there any intention by Metro that the 2001 DA or the 2002 DA should be relied on by the residents, the Court held that the representations could not have caused the plaintiffs' loss.

Claim in negligent misrepresentation

In addition to the TPA, there is the tort of negligent misrepresentation to the effect that where a person owes a duty of care to a class of persons, that person must take reasonable care to avoid foreseeable risk of economic loss caused by inaccurate or misleading statements. The plaintiffs' claims under negligent misrepresentation failed as the Court held there was no duty of care owed by Metro to the residents.

Implications of the decision

- Lodging a development application will not by itself be considered conduct "in trade or commerce."
- A development application will not be considered to be a representation as to future conduct, but rather an application for permission which does not involve any representation that the activity will be carried out.
- No claim can be made against a developer by objectors to a development based solely on representations in a development application.
- Objectors cannot rely on negligent misstatement unless a duty of care is owed by a developer to those objectors.

SOUTH AUSTRALIA - Supreme Court

The Chappel Investment Company Pty Ltd v City of Mitcham [2009] SASC 23

By David Billington (Senior Associate – Norman Waterhouse)

The previously accepted approach for a relevant authority to take when determining whether a proposed development is *non-complying* was to determine the "nature" of the development in accordance with Regulation 16 of the *Development Regulations 2008* and then ask the question, "is that particular kind of development listed as *non-complying* within the relevant provisions of the Development Plan?" Although the relevant authority must still determine the nature of a proposed development, the specific description adopted by the relevant authority will no longer determine whether the proposed development is *non-complying*.

On 5 February 2009 the Full Court delivered its decision in *The Chappel Investment Company Pty Ltd v City of Mitcham* [2009] SASC 23 which upheld the earlier decision of Bleby J in which he held that a proposed retirement village comprised of 11 residential flat buildings was *non-complying* because the relevant Development Plan provided that residential flat buildings were *non-complying*. The Full Court articulated the test to be applied:

> *If the proposed development fits the description of one or more of the non-complying developments* [it is non-complying, and] *the Environment Court has no jurisdiction to hear an appeal from the decision of a planning authority which has refused consent.*
>
> [...]
>
> *It is sufficient for the purposes of s 35(4) of the Act that the development can be described as a kind of development that is non-complying, even though it can also be described in another way which is not a proscribed development*

The Full Court also extended that test to *complying* forms of development:

> *If the proposed development fits one of the kinds of development listed as complying, then s 35(1) of the Act will apply and the planning authority must grant its consent even though the development may also be described in another way.*

The Full Court explained the reason for the test:

> *A complying development would be frustrated if that authority could refuse planning approval for a proposed development that was of a kind listed as complying on the grounds that the development could also be described in a way that was not listed as a complying development. Similarly, developers could walk around the listing of an*