

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Lee & Anor v Department of Justice and Attorney
General & Ors* [2018] QCAT 260

PARTIES: **CHEN WON LEE**
and
SIN MAN SO
(applicants)
v
**DEPARTMENT OF JUSTICE AND ATTORNEY-
GENERAL – OFFICE OF FAIR TRADING
COASTAL HOPE PTY LTD
DANE CHRISTIAN ATHERTON
PHILIP JOHN CHILLEMI
CHARLES KHAN ROBUST**
(respondents)

APPLICATION NO/S: GAR208-17

MATTER TYPE: General administrative review matters

DELIVERED ON: 8 August 2018

HEARING DATE: 26 April 2018

HEARD AT: Brisbane

DECISION OF: Member Paratz

ORDERS: **The decision of the Chief Executive, Department of
Justice and Attorney-General, made on 20 June 2017,
to reject the claim made by Chen Won Lee and Sin
Man So against the Fund, is confirmed.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE
TRIBUNALS – QUEENSLAND CIVIL AND
ADMINISTRATIVE TRIBUNAL – agents –
representation – where a real estate agent made a
representation that transfer duty was not payable by the
buyers – where it is alleged the agent made a
representation to the buyers that they would forfeit the
deposit if they terminated the contract – where the buyers
had opportunities to avoid or mitigate financial loss –
where the buyers proceeded with the contract – whether
any financial loss suffered as a result of the representati
ons – where it was held that the buyers have not established
that they have suffered loss as a result of the
representations of the agent

*Agents Financial Administration Act 2014 (Qld),
s 82(1)(g)
Property Occupations Act 2014 (Qld), s 212*

**APPEARANCES &
REPRESENTATION:**

Applicants: C Won Lee: self-represented, assisted by a Korean language interpreter
S Man So: self-represented, assisted by a Cantonese language interpreter

Respondents: Chief Executive, Department of Justice and Attorney-General: A Tan, legal counsel
Coastal Hope Pty Ltd: P Chillemi, Director, Harcourts Coastal

REASONS FOR DECISION

- [1] Mr Lee and Ms So ('the buyers') bought a house at 4 Waterlilly Place, Upper Coomera, in Queensland for \$549,500.00. The real estate agency acting for the Vendor was Harcourts. The Contract was dated 12 July 2016.
- [2] Coastal Hope Pty Ltd is the corporate entity of Harcourts, and Mr Atherton and Mr Chillemi are Directors.
- [3] Mr Robust was the agent involved in the negotiations ('the agent').
- [4] The buyers say that the agent made misleading representations to them as to:
 - (a) whether they would have to pay transfer duty on the purchase as first home buyers, and
 - (b) that they would forfeit their deposit if they terminated the contract.
- [5] The buyers filed a claim, on 6 October 2016, on the fund maintained by the Chief Executive under the *Agents Financial Administration Act 2014 (Qld)* ('AFAA'). The claim was for the amount of the transfer duty of \$9,702.50 plus the filing fee of \$326.80, making a total of \$10,029.30.
- [6] On 20 June 2017 the Chief Executive made a decision rejecting the claim. The buyers filed an Application to Review the decision of the Chief Executive, in the Tribunal, on 26 July 2017.
- [7] The application was heard in an oral hearing before me on 26 April 2018.
- [8] Mr Lee was assisted by a Korean language interpreter, and Ms So was assisted by a Cantonese language interpreter. Each of them said that they had satisfactory English language skills, and could understand and participate in the proceedings, but wished to be assisted with complex language.
- [9] These are my reasons and decision in the matter.

Relevant Legislation

- [10] Section 212 of the *Property Occupations Act 2014* (Qld) concerns false representations about property:

212 False representations about property

- (1) A licensee or real estate salesperson must not represent to someone else anything that is false or misleading relating to the letting, exchange or sale of real property.

- [11] A breach of s 212 of the *Property Occupations Act 2014* (Qld) is a claimable event on the fund under the AFAA:¹

82 Claims

- (1) A person may claim against the fund if the person suffers financial loss because of the happening of any of the following events –

...

- (g) a contravention by a relevant person of the following provisions of the *Property Occupations Act 2014* –

...

- section 212.

Evidence and submissions of the buyers

- [12] Mr Lee and Ms So are married. They filed a joint statement of evidence.²
- [13] Mr Lee stated that he and his wife inspected the house on 10 July 2016 with the agent; that he had researched transfer duty on websites and with other agents; and that he discussed transfer duty payable with the agent who said that he thought they would have to pay approximately \$10,000 as transfer duty as first home buyers.
- [14] Mr Lee originally offered \$530,000 to buy the house, but that evening increased his offer to \$540,000 in a conversation with the agent. The agent told him that the vendors wanted \$560,000, which Mr Lee refused.
- [15] Mr Lee said that the next day, 11 July 2016, he and his wife met the agent at the agency's office and the following conversation took place:³
- a) When we met him at the parking lot, and he said 'Good news! You don't need to pay any stamp duty.'
 - b) I told him 'I checked just a few minutes ago and the Qld government website said I had to pay stamp duty if the selling price was above \$500,000.'

¹ Section 82(1)(g) AFAA.

² Statement of Chen Won lee and Sin Man So, filed 27 February 2018.

³ Ibid [2].

- c) Once we entered his office, he showed us an email from his solicitor which said 'the cut-off was raised up to \$549,999.00 for stamp duty exemption'.
- d) We asked him about the Qld government website which showed the approximate stamp duty payable.
- e) He said 'It has changed but normally the government website is updated later. Moreover, this email came from my lawyer and this is reliable'.
- f) He said 'The seller will not sign on \$540,000. How about increasing another \$10,000.00? You don't need to have to pay the stamp duty and if you increase the price up to \$549,000 you can secure the house.'

[16] Mr Lee said that he increased his offer to \$549,500 on the understanding that he would not have to pay transfer duty. He said that he later sent a text to the agent to confirm, saying 'The total money from my pocket will be \$550,000'.

[17] The buyers signed the contract for \$549,500 on 12 July 2016.

[18] Mr Lee said that he did not read the contract as to the deposit clause, or as to the cooling-off period, as this was the first time he had purchased property in Australia.

[19] Mr Lee said that his English language was good, although he had some difficulty with legal language.

[20] The buyers engaged *bytherules* conveyancers at the time of signing the Contract. On 13 July 2016 the buyers received an email from the conveyancer advising that the Vendor had countersigned the contract, and advising that the deposit of \$54,950 was payable that day.

[21] The buyers received an email from the conveyancer on 14 July 2016 which included forms as to transfer duty.

[22] Mr Lee said that he sent texts to the agent, and had a conversation with the agent, on 15 July as to the transfer duty, but was unable to resolve the issue.

[23] The buyers proceeded with the purchase, and said they did so for the following reasons:⁴

Since that, we decided to proceed with the contract and eventually settled down on the house because we liked the property and location. Another reason was that we did not want to lose the deposit which we had already paid to Harcourt. Mr Robust told us if we cancelled the contract, the deposit would be confiscated. On top of that, we were wondering why we had to lose our money? It was obvious that this was a calculated misleading plot to deceive us. Therefore we lodged our complaint to OFT.

[24] Mr Lee said that the agent told him he would not have to pay the deposit until the finance was approved.

⁴ Ibid [8].

- [25] In his evidence, Mr Lee said that when he received the email of 14 July 2016 from the conveyancer he did not read it fully. He said that he spoke to the conveyancer about the transfer duty on 15 July 2016, but did not talk about getting out of the contract.
- [26] The buyers say that on or around 15 July 2016 the agent told them they would lose their deposit if they terminated the contract.
- [27] Mr Lee said that his budget was \$550,000 in total to buy the house. He had spoken previously with the 'Defence Bank' and they said that the maximum they would lend him was \$270,000.
- [28] Mr Lee said the extra \$10,000 needed to pay the transfer duty was borrowed from his wife's brother, as he knew the bank would not lend the further amount.
- [29] Mr Lee said that he did not discuss seeking to withdraw from the contract under the finance clause in the contract with the conveyancer, and instructed the conveyancer to confirm that the finance was satisfactory.
- [30] Mr Lee said that he continued with the contract because he had paid a fee to have it inspected, and didn't want to lose that.
- [31] On the hearing Mr Lee claimed that if he had known that he could have withdrawn from the contract without losing the deposit, he would have withdrawn.
- [32] He said that he did not question the conveyancer about withdrawing from the contract because 'we wanted the house'. He said that thought that this was his last chance to buy a house, that he was about to lose his job and it was last chance to get a mortgage from the Defence Bank. He said that his understanding was that if he withdrew from the contract he would lose his deposit and the inspection fee.
- [33] Ms So said that she had first become aware that transfer duty was payable on the Contract on 15 July. She said that she had previously discussed borrowing money from her brother, so she knew she could approach him to borrow money for the transfer duty.
- [34] She said that she did not consider trying to withdraw from the contract as she 'had different thinking at the time', that she had to consider her family, their financial future, and the price of the home.
- [35] She said that by 'the price of the home' she meant that houses were getting more expensive, and she thought the market was going up. She said that she considered all reasons and concluded that it was still worth buying the house for a total of \$560,000 (including stamp duty) with the support of her brother.

Submissions of the Chief Executive

- [36] The Chief Executive submits that section 212 of the *Property Occupations Act 2014* refers to false or misleading representations 'relating to the sale' of real property, and that once the contract of sale is signed, the sale has been made, and any subsequent representation can no longer be relating to or in relation to the sale.

- [37] It submits that the representation as to the deposit not being refundable was made by the agent on or about 15 July 2016, which was three days after the contract of sale was signed, and is not a representation to which section 212 could apply.
- [38] It notes that the representation as to how much stamp duty was payable, is alleged to have occurred the day before the contract was signed, and if established, could give rise to a claim against the fund.
- [39] The Chief Executive submits that the representation as to stamp duty did not cause the buyers to suffer loss, as they became aware of the misrepresentation and could have withdrawn without penalty under a cooling-off period clause in the contract:⁵

11. The evidence establishes that the contract of sale was subject to a cooling-off period expiring on 18 July 2016 which allowed the Applicants to withdraw for any reason. Their conveyancers told them of this in writing on 14 July 2016. According to the Applicants, they were aware by no later than 15 July 2016 that the Stamp Duty representation was false and that they would have to pay stamp duty.

12. Accordingly, from 15 July 2016 onwards, the Stamp Duty Representation is no longer a causal factor because the Applicants know that it is false and stamp duty will be payable if they continue with their purchase.

13. Despite this, the Applicants elected to continue with their purchase and thereby elected to pay the stamp duty that they now seek from the Fund. They did not do so in the belief that stamp duty would not be payable because they knew that it would be payable since at least 15 July 2016.

Discussion

- [40] It is not disputed that the agent made a representation to the buyers, before they signed the Contract, that the buyers would not have to pay stamp duty.
- [41] The expression ‘stamp duty’ is a term formerly used, and still popularly used, to describe what is properly called ‘transfer duty’.
- [42] Mr Chillemi made an inquiry by email, on 11 July 2016 at 9.09am, to Ms Crimmins, a conveyancing paralegal with *bytherules* conveyancers, asking if she could tell him ‘the stamp duty for a first home buyer buying a property with contract value of \$560,000’.
- [43] Ms Crimmins replied by email, on 11 July 2016 at 9.22am, as follows:

Hi Phil,

The cut off was raised to \$549,999.00. As the purchase price is \$560,000.00 the stamp duty exemption for first home doesn’t apply & they would have to pay \$11,050.00 for stamp duty.

The grant has been increased to \$20,000.00 for new & off the plan properties up to \$750,000.00.

⁵ Chief Executive’s Closing Statement, [11].

- [44] The agent made the representation based upon the advice given by to Mr Chillemi by the conveyancer in their email of 11 July 2016, that the limit for first home buyer stamp duty exemption was \$549,999.00.
- [45] It is unclear whether the email from the conveyancer contained a typographical error as to the limit for a first home buyer, or whether the conveyancer gave incorrect advice.
- [46] I am satisfied that the agent did make a representation to the buyers that they would not be liable for transfer duty as first home buyers. That representation was made based upon the advice he had received from a conveyancing firm.
- [47] That representation was a factor taken into account by the buyers in making an offer of \$549,500.00, which was very close to the “all-up” maximum level of \$550,000.00 which they could afford, based upon their pre-arranged borrowing from the Defence Bank.
- [48] The buyers found out from the conveyancer, two days after signing the Contract, that they would have to pay transfer duty on the purchase of about \$10,000.00. That would mean that their total expenditure would be \$559,500.00 including transfer duty.
- [49] The buyers did not make enquiries as to, or attempt to, withdraw from the Contract when they became aware that they would have to pay transfer duty. It appears that the buyers were attempting to come to some arrangement with the agent, which presumably would have involved the agent paying them some compensation, whilst still proceeding with the purchase.
- [50] It is a common procedure for a purchaser to borrow all or part of the transfer duty from their financier, and for the financier to include that in the loan amount together with other associated charges such as document preparation fees, mortgage insurance, bank fees, lodging fees, and transaction duty on the mortgage. The total loan amount is the amount that would be considered in complying with the finance clause in the contract.
- [51] On the evidence of Mr Lee, an application for finance to the Defence Bank for the amount of \$280,000, which is the amount, including transfer duty, which he would have required to borrow from it to complete the contract, would have been refused.
- [52] The Contract provided that the buyer could terminate the contract if finance was refused.⁶

3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.

3.2 The Buyer must give notice to the Seller that:

- (1) approval has not been obtained by the Finance Date and the Buyer terminates this contract

⁶ Contract of Sale, Clause 3.1.

[53] If the contract was terminated by the buyer, the deposit was refundable:⁷

(1) The party entitled to receive the deposit is:

...

(b) if this contract is terminated without default by the buyer, the buyer

[54] The Contract provided that the Finance Amount was ‘sufficient to complete any bank or financial institute’, and the Finance Date was ‘14 days from contract date’⁸

[55] On the evidence, the buyers could have obtained a legitimate formal refusal of finance from the Defence Bank within 14 days of the date of the contract, and would have been able to give notice to the Vendor accordingly, and withdraw from the contract without penalty, and with a full refund of their deposit.

[56] It is not disclosed how much the buyers paid for a pre-purchase inspection of the house, or when they did so. They were concerned that if the contract was cancelled that they would get no benefit from that expenditure. It is not clear however at what stage they organised and paid for that inspection. If it was arranged before the representation as to transfer duty, then it cannot be seen as a consequence of the representation.

[57] The contract contained a ‘cooling-off’ provision as follows:⁹

The contract may be subject to a 5 business day statutory cooling off period. A termination penalty of 0.25% of the purchase price applies if the Buyer terminates the contract during the statutory cooling-off period.

[58] The buyers did not seek to withdraw from the contract during the cooling off period. If they had done so, their loss would have been 0.25% of \$549,500.00, which is \$1,373.75.

[59] When the buyers found out, two days after signing the contract, that they had to pay transfer duty, they therefore had two opportunities to withdraw from the contract – either under the finance clause, in which case they would not have suffered any loss; or under the cooling-off period, in which case their loss would have been \$1,373.75.

[60] The alleged representation by the agent that the deposit was not refundable, was made three days after the Contract was signed, and they could have discussed the issue with the conveyancer, if they wished to terminate the contract.

[61] In order for a claim to be paid from the Fund, it is necessary for the claimants to establish that they have suffered financial loss, and there is a duty on a claimant to mitigate their loss.

[62] Ms So said that they had wanted to proceed with the purchase of the new house for family reasons, and because she thought it was still a good buy even with the transfer duty, as she thought the market was rising, and they were prepared to borrow the extra money from her brother for the transfer duty in order to proceed.

⁷ Contract of Sale, Clause 2.4.

⁸ Contract of Sale, p 3.

⁹ Contract of Sale, p 5.

- [63] I find that the buyers did not make inquiries as to, or adopt, either of the two alternative courses that would have either significantly mitigated, or completely avoided, their financial loss.
- [64] The buyers have claimed their loss as being the full amount of the transfer duty.
- [65] I am satisfied that the buyers made a conscious decision to continue with the Contract, and have not established that their claimed financial loss resulted from the representations by the agent.
- [66] The buyers have not established that they have suffered loss as a result of the representations of the agent, and the claim against the fund must fail.
- [67] I order that the decision of the Chief Executive to reject the claim is confirmed.