

# ALERT

3 October 2012

## *Awad v Twin Creeks Properties Pty Ltd [2012] NSWCA 200*

### 1. Background

In this case, the New South Wales Court of Appeal considered whether developers may remove the burden of proving they had reasonable grounds for making a future representation by producing evidence that tends to establish they did have reasonable grounds.

The court decided that developers can show they had reasonable grounds for making a future representation by adducing evidence that tends to *establish* they did have reasonable grounds. Oral examination of an experienced representative of the developer (such as a director) may be sufficient to reverse the onus.

### 2. The law

Pursuant to section 51A of the *Trade Practices Act 1974* (the equivalent is now section 4 of the *Competition and Consumer Act 2010*), if a person makes a representation, without reasonable grounds about a future matter, the representation is misleading. Where a representation is being relied upon by a buyer, the person making the representation (in this case, the

developer) is taken to not have reasonable grounds for making it unless evidence is adduced to the contrary.

### 3. Facts

Mr and Mrs Awad purchased a vacant block of land from the developer, Twin Creeks Properties Pty Ltd (**Twin**). The Awads alleged that they relied on a number of representations in promotional material and oral representations made by an estate agent acting on behalf of Twin.

The representations related to two specific matters. First, that the development would comprise 177 lots of at least one acre in size each. Secondly, Peppers Retreats, Resorts and Hotels (**Peppers**) would be responsible for the management of the proposed resort hotel, restaurant and other recreational facilities at the development.

The Awads claimed that they were entitled to rescind the contract and transfer the property back to Twin as a result of Twin's misleading and deceptive conduct.

At first instance, the Supreme Court held that the



representation relating to Peppers was misleading and deceptive. However, the court awarded damages to the Awards rather than enabling them to rescind the contract.

#### 4. Decision

On appeal, the Court of Appeal heard evidence from a director of Twin. The director was experienced and gave a strong performance under oral examination. In dismissing the appeal, the court held that if a developer could produce evidence indicating reasonable grounds to defend a claim of lack of reasonable grounds, then the assumption that there were no reasonable grounds did not apply.

#### 5. Conclusion

This decision indicates that:

- developers can, in effect, remove the burden of proving they had reasonable grounds for a representation by producing evidence that tends to establish they did have reasonable grounds; and
- oral examination of an experienced representative of the developer may be sufficient, on its own, to reverse the onus.

Despite the decision, it is strongly recommended that developers retain documentary evidence for all representations about future matters.

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