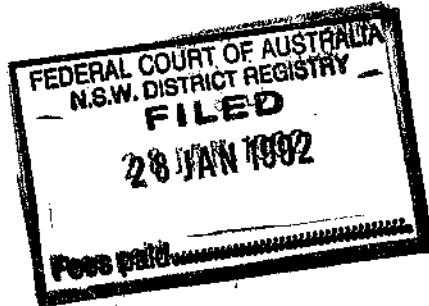


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ORIGINAL

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY)
GENERAL DIVISION)

60029 / 1992
No of 19



ALEC FINLAYSON PTY
LIMITED (ACN 001 144
501)

Applicant

ARMIDALE CITY COUNCIL

First Respondent

BASIA HOLDINGS PTY
LIMITED (ACN 002 375
528)

Second Respondent

STATEMENT OF CLAIM

1. The Applicant is duly incorporated and entitled to sue in its corporate name and style.
2. The First Respondent is a body corporate pursuant to Section 22 of the Local Government Act, 1919 (NSW) (the "LG Act").
3. The Second Respondent is duly incorporated and is entitled to be sued in its corporate name and style.
4. At all material times each of the Respondents was a trading corporation within the meaning of that expression in the Trade Practices Act, 1974 (Cth) (the "T P Act").

This Statement of Claim is filed by Messrs Hunt & Hunt,
Solicitors, of Gateway, 1 Macquarie Place, Sydney NSW 2000.
DX 214 Sydney. Telephone: (02) 391-3000. Ref: JLR:ROB 102110

5. Prior to 9 August 1984 the Second Respondent was the registered proprietor of all of the land comprised in Lot B, Deposited Plan 161700 being a parcel of land situated between Martin Street, the Northern Railway line and White Avenue in the city of Armidale ("the property").
6. At all material times the property referred to in paragraph 5 hereof was, and still is, within the area administered by the First Respondent pursuant to and for the purposes of the LG Act and the Environmental Planning and Assessment Act 1979 ("the EPA Act").
7. From about 1967 to the late 1970's the property, or part thereof, was used for the purpose of the treatment and impregnation of timber with creosote and copper-chrome arsenate ("CCA").
8. Between 1968 and the late 1970's there were spillages of creosote and CCA into the soil surrounding the impregnation and treatment plant and there were complaints to the First Respondent in respect of the said spillages from neighbouring residents and occupiers of land adjacent to the property.
9. By reason of the matters referred to in paragraphs 7 and 8 hereof and by the process of leaching and transmission by surface and underground water, the property became contaminated by creosote and CCA.
10. At all material times the Respondents and each of them knew or ought to have known the matters alleged in paragraphs 7, 8 and 9 hereof.

11. In about July 1984 the Second Respondent applied to the First Respondent for approval to sub-divide part of the property into nine residential lots (the "nine lot sub-division").
12. By Notice dated 9 August 1984 the First Respondent granted development consent for the sub-division of the part of the property, being part of the land comprised in Lot B, Deposited Plan 161700, into nine residential lots, subject to conditions, none of which related to or required the assessment of the soil conditions prevailing at the time of the application.
13. On 13 September 1985 the Council Clerk, on behalf of the First Respondent, certified that the nine lot sub-division complied with the requirements of the L G Act.
14. On 30 October 1985, the Second Respondent applied to the First Respondent for approval to sub-divide the balance of the land comprised in Lot B, Deposited Plan 161400 into twenty-seven residential lots (the "twenty-seven lot sub-division").
15. On 29 November 1985 the First Respondent granted development consent for the sub-division of the said land into twenty-seven residential lots without imposing any conditions in relation to or requiring an assessment of the soil conditions prevailing at the time of the application.
16. On 15 December 1987 the Council Clerk, on behalf of the First Respondent, certified that the twenty-seven lot sub-division complied with the requirements of the L G Act.

17. Between 23 October 1985 and 22 May 1989, the Applicant entered into and completed six contracts for the purchase of land from the Second Respondent, such land comprising the whole of the twenty-seven lot sub-division and five lots of the nine lot sub-division, the particulars of which are set forth in the Schedule hereto.

18. In January 1990 an inspector of the First Respondent undertook an inspection of one of the lots within the nine and twenty seven lots subdivisions and, as a result of that inspection, engaged consultants, Sinclair Knight and Partners, to undertake comprehensive testing of the area.

19. On 25 January 1991 consultant, AGC Woodward-Clyde completed a report for the State Pollution Control Commission ("SPCC") which concluded, inter alia, as follows:

- (a) Copper was present at concentrations above the acceptable SPCC determined threshold in a number of areas within the site tested.
- (b) Areas within the site tested, particularly around the area of the former timber treatment plant, were contaminated by significant levels of arsenic and polycyclic aromatic hydrocarbons ("PAH").
- (c) The potential carcinogenic risk for children at the highly contaminated area of the site tested was not acceptable.
- (d) Land uses other than residential, for example, light industrial, would have lower associated health risks and would, therefore, be a more acceptable use of the land.

20. The First Respondent represented to the Applicant that the land comprised in the nine and twenty-seven lot subdivisions was safe and suitable for residential purposes.

PARTICULARS

- (a) The First Respondent issued a development and sub-division consent on 9 August 1984 in respect of the nine lot sub-division and 29 November 1985 in respect of the 27 lot sub-division.
 - (b) The Council Clerk, on behalf of the First Respondent, certified on each of the said Deposited Plans of the nine and twenty-seven lot sub-divisions that the requirements of the L G Act had been complied with.
 - (c) The First Respondent issued the Deposited Plans containing the said certificate to the Second Respondent to enable the same to be registered at the Land Titles Office on or about 9 December 1985 in respect of the nine lot subdivision and 10 February 1988 in respect of the twenty-seven lot subdivision.
21. The First Respondent knew, or ought to have known, that the Applicant would rely upon the representation referred to in paragraph 20 hereof.
22. In reliance upon the representation referred to in paragraph 20 hereof and induced thereby:-
- (a) The Applicant completed the purchase of the land comprised in the twenty-seven lot sub-divisions on 3 February 1986.
 - (b) The Applicant completed the purchase of five of the nine lot sub-division on 2 November 1988, 5 November 1988 and 22 May 1989.
 - (c) The Applicants expended moneys to develop the land and build dwelling houses on the lots purchased.

(d) The Applicants incurred charges, disbursements and interest on borrowings in respect of the said acquisition and building works.

23. The representation pleaded in paragraph 20 hereof was untrue, misleading and deceptive.

PARTICULARS

The land comprised in the nine and twenty-seven sub-divisions was contaminated with creosote and CCA, and was not suitable for residential purposes or safe for occupation by adults for more than eight hours per day or by children for any period.

24. In the premises, the First Respondent engaged, in trade and commerce, in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of the provisions of 52(1) of the T P Act.

25. Further, or in the alternative, the First Respondent was under a duty of care to the Applicant to give proper consideration to the development applications referred to in paragraphs 11, 12, 14 and 15 hereof and to refuse to approve the sub-division of the said land into residential allotments.

PARTICULARS

- (a) The First Respondent was under a duty to act reasonably in dealing with applications for subdivision.
- (b) The First Respondent and the Applicant were in a relationship of proximity in that at the time the said applications for subdivision into residential allotments were being considered by the First Respondent, the Applicant had entered into a contract to purchase and was a future owner of the land comprised in the twenty-seven lot subdivision and was a member of a class of potential purchasers and future owners of the land comprised in the nine lot subdivision.

- (c) The First Respondent knew, or ought to have known, that said land was not suitable for residential purposes.
26. At all material times the Applicant relied upon the First Respondent to exercise its powers to approve or refuse the said applications for sub-division of the property into residential allotments in a proper manner and with proper regard to whether the said residential allotments were suitable for building and development for residential purposes.
27. The First Respondent knew, or ought reasonably have known and foreseen, that the Applicants would or might rely on any decision or determination made in respect of the said applications by the Second Respondent for subdivision of the property into residential allotments.
28. In breach of the said duty of care, the First Respondent approved the sub-division of the property into nine and twenty-seven residential allotments, thereby permitting the creation of the allotments comprised therein.
29. Further, the Applicant became the registered proprietor of all of the land comprised in certificate of title, folio identifier 2/774911, being land adjacent to the impregnation and treatment plant referred to in paragraph 8 hereof east of Martin Street (the "east Martin Street land").
30. The east Martin Street land, was purchased by contract dated 22 October 1987 completed on 26 August 1988 for a purchase price of \$48,000.00
31. At all material times the east Martin Street land was, and still is, within the area administered by the First Respondent pursuant to and for the purposes of the Local Government Act and the Environmental Planning and Assessment Act.

32. The First Respondent represented that the east Martin Street land was suitable for residential purposes.

PARTICULARS

As at the date of the contract and settlement thereof, the east Martin Street land was zoned by the First Respondent Residential 2(c) and Open Space 6(b).

33. In reliance upon the representation referred to in paragraph 32 hereof and induced thereby the Applicant purchased the east Martin Street land and incurred expenses in attempting to subdivide the same.

34. The representation pleaded in paragraph 32 hereof was untrue, misleading and deceptive.

PARTICULARS

The east Martin Street land became contaminated, or liable to be contaminated, by creosote and CCA through the process of leaching and transmission of surface and underground water from the said impregnation and treatment plant and surrounding land and was, thereby, not suitable for residential purposes.

35. In the premises, the First Respondent engaged, in trade and commerce, in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of the provisions of 52(1) of the Trade Practices Act.

36. Further, or in the alternative to paragraphs 29 to 35 hereof, the First Respondent was under a duty of care to the Applicant to give proper consideration to appropriate zoning for the east Martin Street land.

PARTICULARS

- (a) The First Respondent knew, or ought reasonably to have known, that the east Martin Street land was or was liable to be contaminated by the process of leaching referred to in the particulars to paragraph 34 hereof.

(b) The First Respondent and the Applicant were in a relationship of proximity in that at the time the First Respondent determined the zoning of the east Martin Street land the Applicant was a member of a class potential purchasers and was a future owner of the said land.

37. In breach of the said duty of care, the First Respondent zoned the east Martin Street land as "Residential 2(c)".
38. Further, or in the alternative, the Second Respondent promoted and represented to the Applicant that the land the subject of the nine and twenty-seven lot sub-divisions was suitable for building and development for residential purposes.
39. In reliance on the representation pleaded in paragraph 29 hereof and induced thereby the Applicant, did the things and undertook the expenses pleaded in paragraph 22 hereof.
40. The representation pleaded in paragraph 38 was untrue, misleading and deceptive.

PARTICULARS

The Applicant repeats the particulars to paragraph 23 hereof.

41. In the premises, the Second Respondent engaged, in trade and commerce, in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of the provisions of 52(1) of the Trade Practices Act.
42. Further, or in the alternative, the Second Respondent was under a duty of care to the Applicant to disclose all material facts in its possession in relation to the land the subject of the nine and twenty-seven lot sub-divisions prior to exchange and/or settlement of

the said contracts for the sale of land, including the fact that the said land was contaminated with creosote and CCA and was not suitable for residential purposes.

43. In breach of the said duty of care, the Second Respondent did not disclose the said material facts to the Applicant.
44. By reason of the breaches aforesaid, the Applicant has suffered loss and damage.

PARTICULARS

- a) The Applicants paid the purchase price as particularised in the Schedule hereto and expended monies to develop the said land.
- b) The Applicant has been unable to sell seven of the lots purchased from the Second Respondent and the same are of no value or, alternatively worth substantially less than the sum expended to acquire and develop the said lots.
- c) The Applicant has paid costs and disbursements and paid interest on borrowings in respect of the said acquisitions.
- d) The Applicant has suffered damaged and loss of goodwill in respect of the operation of its business as a builder and developer, the details of which will be provided prior to the hearing.
- e) The Applicant is liable to suffer claims against it by the purchasers of the lots sold to third parties.
- (f) The Applicant purchased the east Martin Street land which is of no value or alternatively worth substantially less than the sum expended to acquire and develop the same.

DATED:

J G HARROWELL

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Solicitor for the Applicant

5265a:JLR:CB