

# Labelling an image as an 'artist impression' was found not to give a developer artistic licence in a claim of misleading and deceptive contract over an 'off-the-plan' premium apartment

By Maria Cole

**Australian consumer protection law was given an outing in the Federal Court of Australia when a developer merely added the words 'artist impression' to a computer generated image it intended to use in its marketing materials for an 'off-the-plan' apartment after being warned the image was misleading. The developer then attempted to rely on disclaimers and exclusion clauses in its brochure and contract to defend a claim brought by the purchasers of the apartment for misleading and deceptive conduct.<sup>1</sup>**

## Background

Nina and Walter Ripani purchased an apartment 'off-the-plan' from Century Legend, the developer of a site in Melbourne upon which it was going to build a multi-storey apartment building. The

<sup>1</sup> [Ripani v Century Legend Pty Ltd \[2022\] FCA 242](#).

<sup>2</sup> Pursuant to [section 243\(a\)](#) of the Competition and Consumer Act 2010 (on the basis of having suffered loss or damage within the meaning of [section 237](#) of that Act).

<sup>3</sup> See [section 9](#) of the Fair Trading Act 1986 for the equivalent provision in New Zealand. However, in order to obtain damages in New Zealand for misrepresentation, the Ripanis would need to have brought a civil proceeding under the [Contract and Commercial Law Act 2017](#).

Ripanis' apartment was on the 14<sup>th</sup> floor and was one of the premium apartments in the building, with a \$9.58 million price tag.

Century Legend's promotional materials included a bound brochure containing computer generated images, known as 'renders', showing aspects of the development, including what the Ripanis' apartment would look like. One render in particular caught the Ripanis' attention. It was referred to as a 'hero render' because it showed how spectacular the apartment would be with the living and terrace areas flowing seamlessly into each other on a single level to create an exceptional entertainment space. This hero render was used extensively to promote not only the Ripanis' apartment but the development as a whole, including being used as a large exhibit on the wall of the display suite established at the development site.

Unfortunately, the hero was a zero. It was impossible to construct the Ripanis' apartment in a way that would bear a reasonable resemblance to the hero render. Century Legend had been warned by its architects against using several of the renders to market the project, including the hero render, because they were misleading. The hero render could not be built as depicted. But rather than amend the renders, Century Legend merely had the words 'artist impression' inserted on each render.

Once it became apparent to the Ripanis that they had been completely misled, they filed a claim asking the Court to rescind the contract<sup>2</sup> and award them damages and interest.

## Claim of misleading or deceptive conduct

The Ripanis' case was essentially that the representations conveyed by the 'hero render' were misleading or deceptive within the meaning of [section 18](#) of the Australian Consumer Law (ACL).<sup>3</sup> The Court stated the Ripanis' claim turned upon the answer to the following three questions:

*First, did the render convey the representations as alleged by them, essentially that there would be a free span opening and seamless transition*



*between the internal living areas of the apartment and the terrace?*

*Second, did the Ripanis rely upon any representations conveyed by the render at the time they entered into the contract to purchase the apartment?*

*Third, would the Ripanis have entered into the contract to purchase apartment 14.01 had they not believed at the time that the apartment would be constructed in conformity with the image depicted in the render?*

The Court found that the hero render did convey the representations alleged by the Ripanis, that the Ripanis had relied upon those representations at the time they entered into the contract, and that had they been told the apartment could not be constructed as depicted in the hero render, they would not have entered into the contract.

## The effect of disclaimer and exclusion clauses

It was accepted by the parties that disclaimers and exclusion clauses cannot be relied upon to exclude the operation of the ACL. However, the decision notes that:<sup>4</sup>

*the existence and context of such clauses are often part of the context and circumstances to consider in deciding whether there has been misleading or deceptive conduct, and whether or not, for example, pre-contractual representations were relied upon, or the claimed misleading conduct has been causative of loss.*

In this case, the brochure had a 'no liability' disclaimer buried on page 96 which the Judge noted was *in much smaller font that most of the writing within the brochure, was barely legible against a dark background and contained equivocal and misleading propositions* that could not have cured the impression created by the hero render. Wording that *purchasers must rely upon their own enquiries and inspections* was found to be pointless, given there was nothing to inspect but the renders. The Court found:

*The disclaimer was written in general, boilerplate language and located in the back of a lengthy, glossy hard-bound*

*brochure. Further, the disclaimer was not specifically drawn to the Ripanis' attention and in any event, objectively it should not be expected that potential purchasers, like the Ripanis, would study a glossy marketing brochure with an eye to the fine print of a disclaimer at the back of the booklet. Thus ... the disclaimer did not have the effect of curing the misleading and deceptive representations made by, or on behalf of, Century Legend.*

The agreement for sale and purchase had two exclusion clauses which were acknowledgements by the purchasers that they had not relied on any pre-contractual representations or photographs or other images created for marketing purposes, but had relied upon their own inspections. Once again, the Court found these boilerplate clauses were not fit for purpose and had no 'curative effect'.

The result was the Court rescinded the contract and ordered Century Legend to pay the Ripanis damages and pre-judgment interest (to be quantified), together with costs.

## Lessons learned?

Images need to be accurate. And where a party includes disclaimers and exclusion clauses, they need to ensure the wording is fit-for-purpose and unambiguous. Such wording should be brought to the attention of the other party and indicate clearly why the clauses are there and what the intended consequences will be. In other words, just play fair.

## ABOUT THE AUTHOR



Maria works as a Knowledge Manager in NZDRC's Knowledge Management Team.\*

Maria was previously a civil litigation barrister for over a decade, where she gained experience in arbitration and mediation.

\* Building Disputes Tribunal is a part of the NZDRC Group.

<sup>4</sup> [Oliana Foods Pty Ltd v Culinary Co Pty Ltd \(In Liq\)](#) [2020] VSC 693 at [535].

