



HIGH COURT OF AUSTRALIA

Public Information Officer

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JEFFREY GORDON BUTCHER AND JUDITH KAY RADFORD v LACHLAN ELDER
REALTY PTY LTD

A real estate agent whose brochure for a waterfront property carried a surveyor's diagram which incorrectly showed the vendor's swimming pool wholly within the property had not engaged in misleading and deceptive conduct, the High Court of Australia said today.

Mr Butcher and Ms Radford in February 1997 successfully bid \$1.36 million for the house at Mona Vale on Sydney's northern beaches. The deposit was \$272,000, with \$200,000 paid immediately and the rest payable once the couple sold their home in nearby Newport. The contract provided for a six-month completion date. The couple planned to renovate then sell the house as part of a strategy for ensuring their family's long-term financial security. They planned to move the pool from across the block to sit along one side to open up space for entertaining. Gordon Spring, an employee of Mr Elder, an LJ Hooker franchisee, gave Mr Butcher a double-sided sheet with colour photographs, brief details and a survey diagram. The diagram showed a line marked "MHWM" (mean high-water mark) which was approximately the fence line and also showed a "reclaimed area" between the fence and the water. Disclaimers on each side of the brochure said the information was from reliable sources but could not be guaranteed and buyers should make their own inquiries. The survey report, written in 1980, was attached to a contract sent to Mr Butcher and Ms Radford's solicitor. Following disclosures by vendor Robert Edward Harkins, a new survey and dealings with Pittwater Council and the Department of Conservation and Land Management, which rejected their plan to move the pool, the couple realised the rear boundary crossed the pool.

They commenced an action against Mr Harkins for both fraudulent and innocent misrepresentation and for misleading or deceptive conduct and declined to pay the \$72,000 balance of the deposit. In the New South Wales Supreme Court Justice Robert Austin found Mr Harkins made an innocent misrepresentation and engaged in misleading conduct and ordered him to repay the \$200,000 deposit. Mr Butcher and Ms Radford sued the agent for misleading and deceptive conduct due to the brochure misrepresenting the boundary location. Justice Austin found the agent was not liable. The Court of Appeal dismissed an appeal against the agent. The couple appealed to the High Court.

The Court, by a 3-2 majority, dismissed the appeal. The majority held that the agent did not engage in misleading conduct and did no more than communicate what Mr Harkins was representing, without adopting it or endorsing it. The agent did not hold itself out as being able independently to verify title details. It did not verify the accuracy of the survey diagram, merely stating a belief that sources of information in the brochure were reliable. Mr Butcher and Ms Radford sought advice from an accountant, an architectural designer and a builder as well as solicitors before auction. The disclaimers were significant. Reasonable purchasers would have read the whole document, given its importance, its brevity, and its use as a source of instructions to professional advisers.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*