

Our Ref: AB:20200554
Your Ref:

11 April 2021

Mr Mathew Woolfrey
Senior Producer
A Current Affair

reimerslegal.com.au

By Email Only:

Dear Mr Woolfrey

RE: ZAC HOMES PTY LTD
BISHNU PRASAD ARYAL & PABITRA ARYAL BARAL
EDMONDSON PARK NSW 2174

We act for Zac Homes Pty Ltd. We have been asked to respond to your recent queries with respect to the property at lot [REDACTED] Edmondson Park ([REDACTED]), owned by Bishnu Prasad Aryal and Pabitra Aryal Baral (**Mr & Mrs Aryal**).

By way of background, we note the following:

1. Mr & Mrs Aryal purchased a house and land package with respect to [REDACTED], involving the purchase of the land from the land developer, Gobbo Holdings Pty Ltd (**Developer**) and the construction of a dwelling by Zac Homes.
2. Mr & Mrs Aryal were introduced to [REDACTED] through Glory Group Properties (**Glory Group**), who undertook liaison between Mr & Mrs Aryal and Zac Homes.
3. Mr & Mrs Aryal entered into a contract for the sale and purchase of land (**Land Contract**) with the Developer for purchase of [REDACTED], and entered into a separate home building agreement (**Building Agreement**) with Zac Homes for construction of a dwelling upon [REDACTED].
4. Zac Homes and the Developer are not related.
5. The Building Agreement was entered into between Mr & Mrs Aryal and Zac Homes in late October 2016. Zac Homes understands that Mr & Mrs Aryal entered into the Land Contract with the Developer at around the same time.
6. At the time that Mr & Mrs Aryal entered into the Land Contract with the Developer, the Developer had not yet obtained approval for the land subdivision from Liverpool City Council (**Council**). Zac Homes understands that the Land Contract included provisions that:
 - a. the Land Contract was subject to registration of the subdivision plan (**Subdivision Plan**);

- b. the registered Subdivision Plan may differ from the draft subdivision plan contained in the Land Contract;
 - c. with registration of the Subdivision Plan, the Developer may register easements, covenants and restrictions on title; and
 - d. Mr & Mrs Aryal had the right to rescind the Land Contract if there was any material and detrimental difference between the draft subdivision plan and the registered Subdivision Plan, or where any easements, covenants or restrictions on title materially and detrimentally affected [REDACTED]
7. The Building Agreement provided that if Mr & Mrs Aryal rescinded or terminated the Land Contract, the Building Agreement would also be automatically terminated.
 8. At the time that Mr & Mrs Aryal entered into the Building Agreement with Zac Homes, the plans and specifications for the dwelling to be constructed on [REDACTED] had not yet been approved by Council.
 9. The Building Agreement included a provision that, if the plans and specifications for the dwelling to be constructed had not been approved by Council at the date the Building Agreement was entered into, the plans and specifications were subject to amendment or variation as required by Council.
 10. In about November 2017, Council advised the Developer that it required a mix of housing styles, which must include some attached dwellings. The Developer identified [REDACTED] and neighbouring lot [REDACTED] as lots which would have attached dwellings.
 11. Mr & Mrs Aryal were subsequently advised by Glory Group of the change required to the dwelling to be constructed on [REDACTED] so that it would now be an attached dwelling, rather than a detached dwelling.
 12. On 16 March 2018, Mr & Mrs Aryal's conveyancer sought a price reduction via Glory Group due to the change of dwelling design from detached to attached. This discount was not agreed.
 13. On 6 June 2018, Glory Group advised Zac Homes that Mr & Mrs Aryal wished to on-sell [REDACTED] due to both the delay in registration of the Subdivision Plan, as well as the change to the dwelling from detached to attached. Notwithstanding this advice from Glory Group to Zac Homes, Mr & Mrs Aryal did not ultimately on-sell [REDACTED]
 14. On or about 26 March 2019, the Developer obtained registration of the Subdivision Plan. The registered Subdivision Plan included an instrument which imposed restrictions on various lots (including [REDACTED] that the dwellings constructed on each lot "are to be sited and constructed in accordance with the approved plans and notice of determination (Development Consent) issued by Liverpool City Council for Development Application No. [REDACTED]" (**Restriction**). A copy of this instrument is **attached**. The Restriction is numbered 3 in the instrument.

15. ██████████ referred to in the Restriction required that the dwelling to be constructed upon ██████████ be attached to the dwelling on neighbouring ██████████.
16. On 2 April 2019, Zac Homes provided Mr & Mrs Aryal with amended plans and specifications for the dwelling, showing the dwelling as attached to the dwelling on neighbouring ██████████. The amendments to the plans were permitted under the Building Agreement. A copy of Zac Homes' email of 2 April 2019 enclosing the amended plans and specifications is **attached**.
17. Presumably, following registration of the Subdivision Plan, Mr & Mrs Aryal's solicitor advised them of the Restriction, its impact upon the plans and specifications for the dwelling to be constructed upon ██████████ and their rights with respect to a rescission of the Land Contract.
18. On 4 April 2019, the Developer offered a price reduction of \$20,000 to Mr & Mrs Aryal if they proceeded to purchase ██████████.
19. On 4 April 2019, Mr & Mrs Aryal's solicitor wrote to Zac Homes to advise that Mr & Mrs Aryal were "currently exploring a number of options including that of contract-rescission". On 5 April 2019, Mr & Mrs Aryal's solicitor again wrote to Zac Homes advising that Mr & Mrs Aryal were "not moving forward with either the land contract or the building contract due to the vendor's [Developer's] breach in the land contract".
20. Had Mr & Mrs Aryal elected to rescind the Land Contract, the Building Agreement would also have been automatically terminated.
21. Notwithstanding the communication from Mr & Mrs Aryal's solicitor to Zac Homes on 5 April 2019, on 8 April 2019, Mr & Mrs Aryal's solicitor advised the solicitor for the Developer that Mr & Mrs Aryal would proceed to purchase ██████████ with the \$20,000.00 price reduction.
22. Mr & Mrs Aryal completed the purchase of ██████████ from the Developer in early May 2019.
23. On 26 July 2019, construction certificate numbered ██████████ (**Construction Certificate**) was issued by New Home Certification Group Pty Ltd (**New Home Group**) with respect to construction of the attached dwelling on ██████████. A construction certificate is required under section 6.7 of the Environmental Planning and Assessment Act 1979 (**EPAA**) before any building works can commence. There was no provision in the Construction Certificate requiring that the dwelling upon neighbouring lot ██████████ be constructed at the same time.
24. Although the owners of lot ██████████ had entered into a home building agreement with Zac Homes to construct an attached dwelling upon lot ██████████, they have failed to proceed under that home building agreement. As a result, Zac Homes has been unable to commence construction of the attached dwelling upon lot ██████████. Court proceedings were filed by Zac Homes on 20 July 2020 with respect to the home building agreement with the owners of lot ██████████.
25. On 26 July 2019, Mr & Mrs Aryal appointed Mr Craig Tibbey, accredited certifier, of New Home Group, to be the principal certifier (**Certifier**) with respect to construction of the dwelling on ██████████ in accordance with the Construction Certificate.
26. Zac Homes proceeded to build the dwelling on ██████████ in accordance with the Construction Certificate and its obligations under the Building Agreement.

27. Upon completion of construction of the dwelling upon [REDACTED] in accordance with the Construction Certificate, Zac Homes sought the issue of an occupation certificate from the Certifier (**Occupation Certificate**).
28. The Certifier has refused to issue the Occupation Certificate.
29. On 3 June 2020, the Certifier advised of his grounds for refusing to issue the Occupation Certificate. Zac Homes does not believe the grounds raised by the Certifier are appropriate grounds for refusing to issue the Occupation Certificate. Notwithstanding this, Zac Homes responded to the Certifier with respect to these grounds on 9 June 2020.
30. The Certifier continued to refuse to issue the Occupation Certificate. The Certifier issued a written directions notice under the EPAA on 17 July 2020. This written directions notice required a modified development consent and construction certificate before issue of the Occupation Certificate by the Certifier.
31. Zac Homes does not believe the written directions notice is valid and made written submissions to the Certifier on 21 July 2020 in this regard. It is Zac Homes' assertion that if an Occupation Certificate could not be lawfully issued without the construction of the dwelling upon neighbouring lot [REDACTED], the Construction Certificate with respect to [REDACTED] ought not to have been issued. By extension, Zac Homes believes that because the Construction Certificate was issued without requirement for construction on neighbouring lot [REDACTED], the Occupation Certificate should be issued once all works under the Construction Certificate have been completed.
32. The Certifier issued a further written directions notice on 23 July 2020. On 28 July 2020, Zac Homes again made submissions to the Certifier with respect to written directions notice, seeking to have it withdrawn and the Occupation Certificate issued.
33. The Certifier issued a third written directions notice on 4 August 2020. Yet again, Zac Homes provided submissions to this written directions notice on 13 August 2020.
34. In an attempt to resolve the impasse with the Certifier, Zac Homes has undertaken various steps on behalf of Mr & Mrs Aryal to obtain the issue of the Occupation Certificate by the Certifier, including:
 - a. on-site meetings with the Certifier;
 - b. representations to Council; and
 - c. the lodging of a complaint to Fair Trading NSW.
35. Despite these additional steps, the Certifier has continued to refuse to issue the Occupation Certificate.
36. Zac Homes wrote to Mr & Mrs Aryal on 18 November 2020 advising them of the impasse and Zac Homes' attempts to obtain the Occupation Certificate. A copy of that letter is **attached**.

37. Zac Homes has continued to pursue the issue of an Occupation Certificate from the Certifier.
38. On 26 February 2021, the solicitor for the Certifier wrote to us. The Certifier and Council appear to be in disagreement as to how the Occupation Certificate should be issued for [REDACTED]. That letter included a letter between the Certifier's solicitor and Council's solicitor, as well as a letter from the Certifier's solicitor to Mr & Mrs Aryal.
39. Encouragingly, the letter from the Certifier's solicitor to Mr & Mrs Aryal sets out what the Certifier now requires in order for the Certifier to issue the Occupation Certificate. On 8 March 2021, the Council's solicitor wrote to the Certifier's solicitor confirming that the matter of the issue of the Occupation Certificate could be resolved as was now proposed by the Certifier.
40. Zac Homes is attempting to satisfy these matters. Presently, Zac Homes is lodging the application for the modified development consent, together with an application for the issue of a building information certificate in accordance with Division 6.7 of the EPAA.
41. Notwithstanding the Certifier's failure to issue the Occupation Certificate, the dwelling has been constructed by Zac Homes in accordance with the development consent, the Construction Certificate, and the Building Code of Australia. Specifically, the building materials and construction method used on the boundary wall are compliant with the HardieSmart Boundary Wall System. We **attach** a copy of the design guide for the HardieSmart Boundary Wall System. This information has been provided to the Certifier.

In summary, Zac Homes' position is that:

- A. Mr & Mrs Aryal were aware of the change to the dwelling design from detached to attached, as evidenced by:
 - i. Mr & Mrs Aryal's attempt (through their conveyancer) to negotiate a discount to the price via the Glory Group (see paragraph 12 above);
 - ii. Glory Group's advice to Zac Home on 6 June 2018 that Mr & Mrs Aryal wished to on-sell [REDACTED] because of the change of dwelling design (see paragraph 13 above);
 - iii. the Restriction registered with the Subdivision Plan (and the presumption that Mr & Mrs Aryal's solicitor advised them of the Restriction) (see paragraph 14 above); and
 - iv. Zac Homes providing a copy of the amended plans and specifications on 2 April 2019 whilst Mr & Mrs Aryal continued to have a right to rescind the Land Contract (see paragraph 16 above).
- B. As Mr & Mrs Aryal were aware of the change the dwelling design, they could have elected to rescind the Land Contract (see paragraph 6 above), which would have automatically terminated the Building Agreement (see paragraphs 7 and 20 above).
- C. Mr & Mrs Aryal chose not to rescind the Land Contract, instead purchasing [REDACTED] with a discount of \$20,000.00 off the price in the Land Contract.

- D. The Certifier either invalidly issued the Construction Certificate, or has invalidly refused to issue the Occupation Certificate.

Accordingly, whilst Zac Homes appreciates the frustrations of Mr & Mrs Aryal surrounding the delay in the issue of the Occupation Certificate, these delays are not caused by Zac Homes. Instead, Zac Homes has worked diligently and at its own cost to attempt to remedy the outstanding matters so that the Occupation Certificate can issue. Zac Homes has also agreed to:

- (a) defer payment of its final progress claim from Mr & Mrs Aryal pending issue of the Occupation Certificate; and
- (b) waive a contract price increase of \$22,733.20 permitted under the Building Agreement.

Zac Homes expects that, should "A Current Affair" chose to run a report with respect to Mr & Mrs Aryal and [REDACTED] any reporting will be accurate and responsible having regard to the information provided above, and that "A Current Affair" will portray Zac Homes fairly and honestly. As you would appreciate, any inaccurate or misleading reporting of Zac Homes would have a significant adverse effect upon the business of Zac Homes.

To this end, please provide us with your undertaking that any reporting by "A Current Affair" will not be to the effect:

- (a) that Zac Homes did not construct the dwelling in accordance with the Building Agreement;
- (b) that the dwelling has not been constructed in accordance with the Building Code of Australia or appropriate building standards; or
- (c) that Zac Homes has been at fault for the failure of the Certifier to issue the Occupation Certificate.

Please let us have this undertaking by 12 noon Monday 12 April 2021, failing which we will seek our client's instructions with respect to obtaining urgent injunctive relief. In that event, this letter will be tendered with respect to any application for costs of those injunctive proceedings.

We look forward to hearing from you. Should you have any further queries, please contact us.

Yours faithfully
REIMERS LEGAL



Anthony Brischetto
Solicitor - Director

Contact: Anthony Brischetto
Email: [REDACTED]