



Property Newsletter

February 2008

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CBP hosts successful UDIA Market Luncheon

CBP once again sponsored the recent UDIA Market Luncheon. Held at the Hilton Hotel on Friday 22 February, the event was extremely well attended by over 200 people.

Speaking at the event was Brendan Crotty, Company Director, and former Australand CEO; and Rod Cornish, Divisional Director, Real Estate Group, Macquarie Bank. In Brendan's address, he examined the drivers of the property market, and gave his outlook for the NSW residential sector. Rod then outlined the broad macro issues that are impacting on the property market in NSW.

Another feature of the event was the official launch of the 2008 UDIA NSW Policy Agenda. The Policy Agenda contains 21 recommendations that, according to UDIA NSW, if pursued will generate a more balanced and equitable regulatory and economic framework for the provision of new communities in NSW.

www.udia-nsw.com.au

Stamp duty changes for the new year

2008 has seen a change in both exemptions from duty and the manner of making payment of duty.

For all leases signed from 1 January 2008, no stamp duty is payable. The relevant date is the date of signing the lease, not the lease commencement date.

Late last year, the Office of State Revenue announced, in accordance with the budget, the abolition of stamp duty on mortgages with respect to owner occupied homes. From 1 July 2008, stamp duty on other mortgages of residential property will be abolished.

A new procedure announced late in 2007 has the effect that the Office of State Revenue will now not accept personal or company cheques for any duty amounts over \$50. This used to be \$20,000.

All stamp duty amounts over \$50 must be paid by either a solicitor's trust account cheque or a bank cheque.

Chris Rumore
Partner

T: 02 8281 4555
E: acr@cbp.com.au

"Reasonable Endeavours": Wolseley Investments Pty Ltd v Gillespie

In the previous issue of this newsletter we discussed the meaning of "reasonable endeavours" and the practical implications of including in legal documents an obligation on a person to use "reasonable endeavours" to attain a stated objective. It was pointed out that the inherent vagueness in the meaning of that term could lead to costly legal disputes where the promisee, the person with the benefit of a promise, claims that the promisor has breached his or her contractual obligations.

In the recent decision of *Wolseley Investments Pty Ltd v Gillespie* the New South Wales Court of Appeal considered whether a company that managed a company title building had breached its contractual obligations to proceed with "due dispatch" and use its "best endeavours" to lodge and secure the Council's consent to a development application.

In company title buildings, a company owns the apartment building and shares in the company are issued to a person giving that person the right to exclusively occupy a specific apartment in

the building. The shareholder does not own the apartment, only the shares. This is different from 'strata title' buildings that confer legal title to the apartments.

In *Wolseley Investments*, the occupant of one of the apartments in the building, Ms Gillespie, had agreed to purchase a number of shares from the Company for \$800,000 in exchange for the exclusive right to occupy an unused attic area above the apartment she occupied. This agreement was conditional upon the Company obtaining the Council's consent to a development application for the use of the attic area as a residence. The company agreed that it would proceed with all "due dispatch" in lodging the development application and that it would use its "best endeavours" to secure the Council's consent to that application.

For a number of reasons, the Company did not lodge the development application for more than eleven weeks after the agreement was signed. Furthermore, the Company delayed providing a fire report and safety information as requested by the Council, resulting in the initial rejection of the development application.

Ms Gillespie instituted legal proceedings against the Company claiming that it had breached its contractual obligations to proceed with due dispatch and use its

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reasonable endeavours in lodging and attaining the Council's consent to the development application. Ms Gillespie sought an order for specific performance of the contract. That is, she sought an order compelling the Company to perform its contractual obligations. Specific performance will only be awarded in cases where damages for some reason are an inadequate remedy.

The trial judge and the Court of Appeal both held that the Company had not breached its contractual obligations. The Court of Appeal considered that the meaning of the terms "due dispatch" and "reasonable endeavours" must depend upon the particular circumstances of the case. The Court affirmed that an obligation to use "best endeavours" imports an obligation not to hinder or prevent fulfilment of the stated objective. However, this does not require the person who undertakes the obligation to go beyond the bounds of reason; he or she is required to do all he or she reasonably can do in the circumstances to achieve the contractual object, but no more.

Applying these principles, the Court found that the Company's delay in lodging the development application and in providing the necessary reports was reasonable in the circumstances. It was significant that much of the Company's delay was occasioned by waiting for the Council's

response to a question posed by the Company regarding the possible presence of an "existing use" right in the attic area. The Court also pointed out that the Company had requested an extension of time from the Council "to consider how best to respond" to the situation. This request was considered to be reasonable and did not amount to a failure to use best endeavours to obtain the Council's consent.

Despite holding that the Company had not breached its contractual obligations, the trial judge awarded Ms Gillespie an order for specific performance of the contract. However, this order was overturned on appeal. The Court of Appeal considered that specific performance should not have been awarded given that the Company was not in breach of its contractual obligations nor was there reason to apprehend any such breach.

What cases like *Wolseley Investments* illustrate is the importance of managing parties' expectations. Parties' expectations can be managed by setting out in the contract in as much detail as appropriate what each party is required to do to satisfy his or her contractual obligations. When including imprecise terms such as "due dispatch" or "reasonable endeavours", it is often good practice for a promisee to include particulars of what those terms actually mean and to set out what

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steps the promisor is required to undertake. This is likely to reduce the risk of legal proceedings and the cost, delay and uncertainty that such proceedings often involve.

Brendan Maier
Partner

T: 02 8281 4682
E: bpm@cbp.com.au

Julie Leneghan
Summer Clerk

T: 02 8281 4509
E: jal@cbp.com.au

Collateral agreements and sale of land

The NSW Court of Appeal has recently held unanimously in the matter of *Nassif v Fahd* that a collateral agreement with regards to the sale of land cannot stand, even though there is clear verbal evidence to establish the terms of the collateral agreement, where it is inconsistent with the terms of a written agreement.

The Court of Appeal unanimously overturned the decision of the trial judge at first instance.

The trial judge found that, on the evidence, there was an agreement for the Fahds to sell two properties

which they had purchased at Oatlands to the Nassifs on the basis that the contract would show the price as the same price as the Nassifs had paid. The collateral verbal arrangement was that the Nassifs would pay an additional \$150,000 and all of the out of pocket expenses of the Fahds in acquiring the properties including stamp duty and legal costs.

The trial judge found that the evidence of Mr Fahd was preferable to the evidence of Mr Nassif and that it was totally believable that the collateral agreement was made, having regard to the fact that both were members of the close-knit Lebanese Christian community, had known each other for a long time and that the Nassifs had a particular need to buy two properties next door to each other so that they could build a home next to theirs for their invalided son who required special care.

The trial judge rejected that there was any ulterior motive in not committing the collateral agreement to writing such as avoidance of taxation and preferred the evidence of Mr Fahd that he did not see any need to commit the collateral agreement to writing as he was prepared to rely upon the word of Mr Nassif.

Whilst the Court of Appeal found that the judge's findings on the evidence were sustainable and

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do not seek to disturb them, ultimately the Nassifs succeeded. Particularly the Court of Appeal held, following a long line of decisions in Australia, that effect cannot be given to a collateral agreement which is made in consideration of the entering into of the principal agreement where the terms of the collateral agreement are inconsistent with the principal contract. The parties were entitled to have the principal contract enforced and to have the full benefit of the principal contract without referring to any inconsistent collateral agreement.

The contract in this particular matter had what the Court described as an "entire agreement" clause. Effectively this clause stated, amongst other things, that there were no warranties or agreements, conditions or undertakings between the parties other than those contained in the principal contract.

Having regard to the provisions of this clause and the clear provisions of the principal contract as to the price, the Court of Appeal did not give effect to the collateral agreement.

This decision highlights why it is crucial that any promises, agreements or representations in relation to any legally binding contractual relationship are committed to writing. Even if you can prove, by way of other evidence, the existence of a

collateral agreement (as Mr Fahd was able to do in this case), you still may not be able to succeed in enforcing your rights and recovering monies under the collateral agreement where the terms of the collateral agreement are inconsistent with the terms of the main contract.

Chris Rumore
Partner

T: 02 8281 4555

E: acr@cbp.com.au

Vendor's lien

The matter of *Mitzev v Foxman* involved the sale of a property at Jindabyne where part of the consideration was to be satisfied by "Credex dollars".

The vendor had advertised that it would accept Credex dollars which was a form of exchange of trade dollars and a special condition was incorporated in the contract providing that the deposit and a significant part of the purchase price would be satisfied by Credex dollars.

The matter settled, the Credex dollars were supplied but it turned out that the Credex dollars were worthless.

At first instance, the trial judge held that there had been a failure of consideration and that the vendor was entitled to a vendor's lien over the property and ordered

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that the property be sold to satisfy the vendor's lien. This occurred and the purchaser then appealed to the Court of Appeal to overturn the decision at first instance.

Whilst there was evidence that, some years after the event, the Credex dollars were not able to be traded as the companies running the scheme had gone into liquidation, the Court of Appeal held that whether or not, at the time of settlement, the Credex dollars had a value was a question of fact, proof of which lay with the vendor.

The Court of Appeal acknowledged that ultimately the Credex dollars could not be converted into cash or any other goods. However, as the vendor had not proven that, as at the date of settlement (24 May 2002), the Credex dollars were worthless, the vendor was not entitled to the orders made by the trial judge.

Effectively, even if the vendor had been able to prove that at the time of settlement the Credex dollars lacked value, there is no evidence that either the vendor or the purchaser was aware of this. The Court of Appeal held that if parties make a bargain and later discover that the bargain was based on an incorrect assumption as to the value of assets, the party which "got the poor deal" would not be able to rescind the contract or claim damages for breach of contract.

In other words, the Court of Appeal held that it would not rewrite bargains that parties at arm's length had made in the absence of a breach of condition or some other supervening event (eg fraud).

From time to time one is approached by a client who wishes to embark on a commercial transaction that involves trade dollars. This firm has always taken the view that this is a dangerous course to pursue for the very reasons that transpired in the Mitzev case.

If a party wishes to take something other than cash for the sale of property (goods in kind, trade dollars or the like), there must be some independent verification both at the time of exchange and the time of settlement as to the value of the assets and the negotiability of the assets, particularly where they represent something akin to trade dollars.

Chris Rumore
Partner

T: 02 8281 4555

E: acr@cbp.com.au

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[Succession Act 2006 to come into force on 1 March 2008](#)

The Succession Act 2006 has been proclaimed to come into force from 1 March 2008.

The new Act implements the recommendations of the National Committee for Uniform Succession Laws and, with the commencement of the Act, there will be uniform laws in relation to wills and succession in all the Australian states and territories.

The provisions of the new Act apply to wills made after 1 March 2008, and certain sections of the Act will apply to wills of persons dying after 1 March 2008 (irrespective of when the will was made). A summary of the main provisions of the new Act was given in our newsletter dated November 2006.

The new Act may affect some existing wills and readers would be advised to review their existing wills to ensure that the implementation of the Act does not lead to unintended consequences. If you require assistance please contact Simon Fraser or Sue Tan.

Simon Fraser
Partner

T: 02 8281 4655
E: shf@cbp.com.au

Sue Tan
Senior Associate

T: 02 8281 4653
E: sst@cbp.com.au

[Upcoming seminar: Retail Leasing](#)

On 29 April 2008, the property division will be holding a breakfast seminar on retail leasing issues. The *Retail Leasing Act* not only impacts shop or centre owners, but developers as well (even if you think that the Act does not apply to you as you do not develop shopping complexes). If you make a mistake and treat a lease as not being a "retail" lease when it is, you may incur enormous losses. This happened in a recent case and will be discussed in the seminar.

This seminar will cover a range of topics to alert you to many of the important issues/traps contained within the *Retail Leasing Act*.

Further details on the seminar will be emailed prior to the date.

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Profile

Sue Tan



Senior Associate

T:02 8281 4653

E:sst@cbp.com.au

Sue Tan is a senior associate in our property and development division. Sue joined CBP in 2000 and as well as her property and development practice, Sue also advises clients on probate and succession law. In her spare time, Sue enjoys good wine and travelling and tries to combine the two interests whenever she can.

Carolina Gomez



Senior Associate

T:02 8281 4675

E:cmg@cbp.com.au

Carolina is a senior associate in our property and development division. She is a member of the NSW Young Lawyers Property Committee and has authored several articles for the Committee's newsletter "Gazumped". Carolina has been at CBP since 2004 and enjoys swimming and going to the movies.

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T 61 2 8281 4555
F 61 2 8281 4567
E law@cbp.com.au
I www.cbp.com.au

Level 42, 2 Park Street
Sydney NSW 2000
Australia

DX 280 Sydney
Advoc Asia member

Colin Biggers
& Paisley

ABN 38 941 300 979

LAWYERS