cbp Lawyers

Property

Newsletter

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Warning! Watch out if your agent claims "... there is another purchaser"

The Casey Group entered into a contract to purchase property at Lake Wendouree in Victoria for a price of $8,600,000. A deposit of 10% of the price was paid.

Mr Clint Casey, the former Richmond Football Club president, personally guaranteed performance of the purchaser's obligations under the contract including payment of the price.

Prior to exchange of the contract the vendor's real estate agent, Andrew Lewis, left a telephone message with words to the effect that:

> "... Your offer is no longer acceptable. There is another purchaser. You will have to make an unconditional higher or better offer."

The phone message was left for Scott Mitchell, General Manager of Property for the Casey Group. It was played back to Mr Casey.

Mr Lewis and Mr Mitchell were friends. Before the contract was entered into Mr Lewis wrote by email that the property:

> " ... looks good to me and I think you should come and have a look tiger boy. The Gunstar over and out."

Mr Mitchell told the court that he knew Mr Lewis well and that:

> "he wouldn't be trying to do the wrong thing by him and he was actually trying to do the right thing by him by keeping the offer sort of exclusive…".

Mr Casey in evidence accepted that if a real estate agent told him that he had another purchaser interested in a property he would not, in every case, believe that is the literal truth. He said, however, that there was a difference on this occasion. He had been told by Mr Mitchell that Mr Lewis was a friend and could be trusted.

The vendor admitted that there was not another purchaser interested. Nor was there "... a need to go unconditional. While another offer had been made, it was regarded by the vendor and the vendor's agent as "unacceptable".”

The Victorian Supreme Court accepted Mr Casey's evidence that "unless told that there was another purchaser prepared to make an unconditional offer …he would not have agreed to the unconditional offer."

The Court held that the statement made by the vendor's agent was misleading or deceptive. It was false and was intended to and did convey to the Casey Group a threat that there was another purchaser willing to enter into an unconditional contract at a price equal to or better than the counter-offer; and that if a satisfactory offer was not made by the Casey Group that day the property would be sold to the other purchaser. There was in fact no other purchaser then willing to enter into such a contract. The property was not then at risk of being sold to another purchaser if the Casey Group did not make an unconditional offer that day.

The Court declared that the contract for sale entered into by the Casey Group and the guarantee and indemnity given by Mr Casey to be void. The Court ordered repayment of the deposit ($860,000) and an extension fee paid by the Casey Group ($100,000) and interest since the date of payment.

This case is a warning that "pressure" put on a purchaser to enter into a sale contract, even where the purchaser is an experienced property developer, must be exercised with extreme caution. Particularly as the relationship that property developers have with real estate agents may often be relationship of "friends" who can be "trusted".

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The *new Consumer and Competition Act 2010* (Cth)

With the introduction of the new *Consumer and Competition Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)) the Casey Group decision referred to above is a timely reminder to property professionals that:

- any representation that is false, misleading or deceptive in the context of contract negotiations, even if made orally and without any written record, may be enough to enable an aggrieved person to have the contract set aside at no cost to that person
- under the new *Consumer and Competition Act*, the Court has the power to award damages in respect of a contravention

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- it is important that agents are properly trained so that your agents do not take the risk of making a misleading statement to the effect that that "there is another purchaser…".

Through CBP's Consumer and Competition Act compliance programme, we are able to assist you ensure that your staff and agents are properly trained. If you are interested in learning more about this programme then please contact us.

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Parties unable to complete on scheduled date

There have been two recent Court of Appeal decisions in late 2010 which dealt with the situation of purchasers who have exchanged contracts but then found, due to changed circumstances (particularly an inability to raise finance in the more difficult post GFC economic climate), that they were unable to effect settlement.

The decisions of the Court of Appeal are in the matters of *K & K Real Estate Pty Limited v Adellos Pty Limited (In Liquidation) & Anor* and three matters involving *Everest Property Holdings*, a developer of off the plan units.

In the K & K Real Estate case, the purchaser exchanged just prior to Christmas 2009 with settlement being due in January 2010. However, due to the nervousness of banks lending for development properties, the purchaser was unable to raise finance at the time when settlement was originally due but was able to do so some time after that time.

In the three Everest Property Holdings cases, the matters involved purchasers who had exchanged contracts to purchase properties off the plan but, when the strata plan was registered, found themselves unable to settle.

You may think that, in the post GFC environment, this is not an unusual occurrence but the outcome of the Court decisions have changed the whole conveyancing process.

In one of the Everest Property Holdings matters (involving purchasers by the name of Sarkar and Islam) the purchasers represented themselves. The fact that they did not know what the normal conveyancing practice was was a relevant factor in concluding that their silence did not amount to an indication they would not settle. This was notwithstanding the fact that they

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had effectively "gone to ground", refused and failed to communicate with the solicitor for the vendor, ignored a notice to complete and did not take any action to ready the matter for settlement.

In another of the Everest Property Holdings cases (the matter involving Amaya) and in the K & K Real Estate case, the Court of Appeal surprisingly held the conduct **before** the settlement date was an intimation (on which they vendor could rely) that the purchaser would not settle on the settlement date **and** would not be able to settle after that date.

This finding seems to go completely contrary to the High Court decision in *Foran V Wight* which has been the authority for a considerable period of time and which has indicated that, for there to be a repudiation of a contract, there must be a clear demonstration that, at the time the contractual obligation had to be performed, the party having to perform the obligation was unable, unwilling or refusing to do so.

In the K & K Real Estate case, the party issuing the notice to complete, the vendor, had an issue with one or more caveats on title. It was apparent from the evidence that, at both the time the notice to complete was issued and the time set down for completion, the vendor had not taken appropriate steps to have one or more caveats removed. Notwithstanding this, the judge at first instance held that if the purchaser had been ready to settle, the vendor would have been able to obtain an urgent Court order for the removal of the caveat. This is a somewhat surprising outcome, particularly as the solicitor for the vendor acknowledged that he was aware of and had advised his client (the liquidator) of the process to remove a caveat by way of a lapsing notice but neither he nor his client had done anything to take appropriate steps. It is even more surprising when one has a knowledge of the Court system and how difficult it is to obtain urgent orders of any nature, particularly where there is a long running dispute (which was the case with respect to this caveat).

From the K & K Real Estate case, it is apparent that even though the conduct of the vendor between issuing the notice to complete in January 2010 and terminating the contract in July 2010 (during which time there was substantial negotiations to extend the time for settlement and vary the terms of the contract to enable the purchaser to endeavour to complete) amounted to an affirmation of the contract, the mere fact that the solicitor for the vendor had dealt with these matters under correspondence headed "without prejudice" gave the correspondence the nature of an informal method of communication and therefore the vendor was not bound by the affirmation that was contained in this correspondence.

In all decisions, the Court held, contrary to the normal conveyancing practice, that were a party indicates that it is not ready to settle, the other party does not have to waste its time readying the matter for settlement. However, Young JA in the K & K Real Estate case indicated that it was a very fine line that the vendor's solicitor trod in this regard and that it was a

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dangerous thing for a solicitor not to ready a matter for settlement where the other side appeared not ready to do so.

The following lessons emerge from these cases:

- Where a party does not know what the normal conveyancing practice is, silence will not be treated as an indication of repudiation of the contract. This makes it difficult for vendors and may make developers wary of selling to purchasers who act for themselves.
- If a party is aware of the normal conveyancing practice, then it must do all that it can to ready the matter for settlement to indicate a readiness and willingness to settle.
- Be careful of conduct before the settlement date as this conduct (by virtue of these decisions) can effectively be carried over and be deemed to be a continuing indication of the intention of the relevant party after the time for completion (without anything more being said or done).
- If you are negotiating where you cannot comply with your contractual obligations, the negotiations should be stated to be on the basis that any issued notice to complete is either deemed to been withdrawn or suspended.
- If there is a clear indication that a party cannot settle, you do not have to ready the matter for settlement but, as Young JA said in the K & K Real Estate case, this is a "very fine line".
- For more abundant precaution, the "innocent" party should ready itself for settlement so there can be no dispute that it was ready, willing and able to settle at the appropriate time.
- Heading correspondence "without prejudice" (even where this is an "incorrect" label at law because it is not really correspondence relating to the settlement of a dispute), can make the correspondence an informal channel of communication which cannot then be relied upon as affirmation or waiver of conduct of the other party.
- The innocent party should always in correspondence indicate that the correspondence is without prejudice to its rights and without waiving the essentiality of any time.

These decisions have made the conveyancing process more difficult because the position of parties is now less certain than it was. This makes it all the more necessary to obtain legal advice before taking any action with respect to a contract where it appears that the other party may not be able to comply with its obligations.

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Lessor responsible for damage caused by Lessee

The case of *Konstantopoulos v R & M Beechey Carriers Pty Ltd and ors* [2010] NSWSC 753*,* handed down on 9 July 2010, concerned a lease of part of commercial and industrial premises situated at 25 Fairfield Road, Fairfield. The plaintiffs, Steve and Rosa Konstantopoulos, allege that during the course of the defendant's occupation of the premises they, the defendants, caused damage to the premises and was therefore liable for the cost of repairs.

The lease permitted the defendants to use the premises as a transport depot for receiving and storing shipping containers. Due to the nature of the business, the defendants took the precaution of having inserted into the lease certain provisions that protected them against the consequences of any damage to the concrete surface.

Surrounding the premises was a concrete surface known as the "hardstand area." Included in the lease was an exclusive licence for the defendant to the hardstand area. A significant amount of evidence was directed to the condition of the hardstand area at the time of commencement of the lease but the Judge did not find it necessary to resolve that dispute. However the Judge did note that "the author of the valuation report, even after 16 months' occupation by Beechey and Ratcliffe, made no adverse comment about the condition of the concrete" (at [23]). In September 2003 the defendant complained that the hardstand had been badly cracked and needed repairing. These repairs were effected by December 2004 at the cost of the plaintiffs.

In April 2004 the defendants replaced the forklift they had been using, with a "significantly larger and heavier vehicle" (at [26]). The plaintiffs claimed they protested about the use of the new vehicle, telling the defendants that the concrete could not tolerate the increased pressure. The plaintiffs also claimed that they noticed an increase in the level of activity. The lease expired in November 2004 but one of the defendants remained in occupation on a monthly tenancy until July 2005.

Clause 7.1 of the lease permitted the lessee to use "a large container forklift for moving containers from outside to undercover." Furthermore, clause 7.2 of the lease stated that "the Lessor accepts that any damage requiring repair arising from the Lessee's use of the concrete hardstand area under the Licence...will fall within the 'reasonable wear and tear' exception referred to in" the lease. Thus the New South Wales Supreme Court held that the lessee's use of the forklift on the hardstand area was within the permitted use under the lease and that clauses 7.1 and 7.2 protected the defendants against the plaintiff's claim (at [56]).

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This case is particularly relevant for lessors as normally lessees would be liable for any damage caused by their use of the premises. Lessors need to be careful to ensure that the terms of their leases do not render them accountable for damage that should not be their responsibility to repair.

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Courts leave open the possibility that a registered interest in land may be defeated by a prior oral conversation

Capital Finance Aust Ltd v Pella Properties Pty Ltd & Anor [2010] NSWSC 1262 is a case handed down 16 November 2010 concerning development site at Hawkesbury and Clarence Avenues Dee Why. Pella Properties constructed 33 units known as CeVu on the site, but later went into liquidation in July 2008. The appointment of a liquidator was an act of 'default' under the registered first mortgage held by Capital Finance.

In a written agreement dated 6 September 2004, executed by both parties, it was stated that Mr McHardy, the second defendant, shall be entitled to lot 29 free of costs for his services rendered, upon completion of construction of the units. This agreement came into existence after the mortgage to Capital Finance had been registered in May 2004. The Supreme Court of New South Wales therefore found that Mr McHardy's supposed interest could merely be described as a holder of a subsequent unregistered equitable interest (at [110]) as their Honours had dismissed any possible claim of fraud pursuant to section 42 of the *Real Property Act 1900* (at [106-9]).

Mr McHardy's case was that the written agreement embodied the terms of an oral agreement made in April 2003, prior to registration of the mortgage to Capital Finance and that Capital Finance was on notice of the agreement so it would be unconscionable for it to assert the indefeasibility of its title under the mortgage. If this was in fact true, it would be unconscionable and therefore an exception to indefeasibility not to recognise Mr McHardy's title. In deciding the issue of proof of the alleged conversation, the Supreme Court looked towards the judgment of Hammerschlag J in *Commonwealth Bank of Australia v Serobian [2009] NSWSC 302* where his Honour said that "where a party seeks to reply upon spoken words as a foundation for a cause of action...the Court must feel an actual persuasion of its occurrence or its existence...the

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Court must be persuaded that any consensus reached was capable of forming a binding contract and was intended by the parties to be legally binding" (at [362]).

Mr McHardy contended that the oral agreement consisted of Mr Filleul, principal of Pella Properties, agreeing to give him one of the units free of encumbrance as consideration for acting as site manager (at [117]). Mr Filleul agreed that they had a discussion but argued that the agreement was that after he had recovered his outlay plus 30%, the men would split the profits 50/50 and the unit Mr McHardy wanted would come out of his share of the profits, and if there were no profits then he could not have the unit (at [118]). The Court found Mr Filleul's account of the conversation more plausible as he was an experienced business man who knew that Capital Finance would require a first mortgage and it would be a breach of the security to prefer the interest of Mr McHardy (at [121-2]).

Although the Court was satisfied that the prior oral agreement did not give Mr McHardy an equitable interest in the land, their Honours proceeded to consider whether Capital Finance had knowledge of the agreement. The Court concluded that it was highly unlikely that Mr Filleul, an experienced businessman, would approach Capital Finance and "lay it before" them, before finance had been approved (at [136]). The Court further stated that it would be unusual for an experienced businessman, for his own protection with such an unusual arrangement, not to put the situation in writing to the financier, lest there be some future misunderstanding. The Court found "the second layer of implausibility" was the sudden, positive reaction of the banker in approving finance without seeking clarification or requesting the agreement be reduced to writing (at [137]).

This case illustrates that, although the Supreme Court of New South Wales did not find that the prior oral agreement was sufficient to constitute a contract, or that Capital Finance had knowledge of that prior equitable interest if in fact it did exist, the Court did not rule out the possibility that a prior oral agreement may in fact prevail over a subsequent registered first mortgage.

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