Property Newsletter

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Option periods and section 66ZG of the *Conveyancing Act*

As many of you would know, options for residential property, to be valid, are required to contain a provision which states that they are not capable of exercise within the first 42 days after the option is granted.

Any option of a residential property which does not contain this provision (and which is granted other than by way of an exchange of counterparts, one signed by the purchaser and one by the vendor) is void under section 66ZG of the *Conveyancing Act*.

How does this effect put and call options?

This was answered in the recent decision (handed down on 12 February 2010) in *Evolution Living Property Management Pty Limited v CSP Australia Pty Limited* in the Equity Division of the Supreme Court of New South Wales.

This case involved put and call options for 46 residential units sold off the plan for a strata subdivision at Narooma.

The purchaser sought to have the options declared void by virtue of the provisions of section 66ZG of the *Conveyancing Act*. This section was clearly breached because the call option in favour of the purchaser stated that the call option was granted from the date the deed was entered into.

Therefore, the call option was void and of no effect pursuant to section 66ZG of the *Conveyancing Act*. The Court then considered whether, as a consequence of the operation of that provision on the call option, the put option was also void.

The Court had regard to the legislative purpose with respect to the introduction of that statutory provision. The Court held that the purpose was to ensure that purchasers did not come under pressure to exercise options before they had sufficient time to undertake appropriate investigations.

The Court held that the statutory provision did not make the put option void as it was not an option granted for the purchase of a relevant allotment. The statutory provision was only effective with regards to contractual provisions under which a purchaser could compel the vendor to settle. Section 66ZG was held not to encroach upon any other rights that the parties might seek to create such as the grant of a put option to the vendor.

As the put option could not be exercised until after the call option period expired (which was well after the 42 day period referred to in section 66ZG), the put option was valid and could be enforced by the vendor notwithstanding that the call option in favour of the purchaser was itself void under section 66ZG.

The Court held that this case did not involve a case of statutory illegality because section 66ZG did not prohibit the creation of an option of the type referred to in the section or create penalties for breach of that provision. It merely stated that any such contract was void (thereby changing the parties' contractual rights and obligations that would otherwise have applied).

It was also relevant that the option deed contained a provision to the effect that if any clause was invalid or unenforceable it would be excluded and the rest of the document would remain in full force and effect.

This is good news for vendors but you should ensure that, to avoid any potential issues in the future, all options for residential properties should contain a provision that they cannot be exercised during the first 42 day period from the date of the creation of the option.

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Does a lost view end a contract?

The scenario is that you look at a model to buy a unit off the plan at Rhodes. The agent represents that you will have a 180 degree water view.

The contract has annexed to it a draft strata plan but no other plans, specifications or diagrammatic representations of what is to be built. By virtue of the requirements of Council with regards to landscaping issues, a wall has to be built which substantially reduces the view from the downstairs portion of the unit that you have decided to purchase. You decide that you want to avoid the contract and get your deposit back. Do you have the right to do this? These are the factual circumstances in the recent decision in *Higgins v Statewide Developments Pty Limited*.

The court held that the purchaser could not complain about the existence of the wall as what was contained in the contract was that the vendor would convey what was shown in the draft strata plan.

The draft strata plan is obviously only a two dimensional plan which shows nothing but a prospective floor area and the lot's position.

The court held that the purchaser could have had more detail incorporated in the contract by way of detailed plans, reference to the model that was displayed or a representation from the vendor that the property, as built, would present uninterrupted water views. The purchaser did not negotiate any such provisions in the contract.

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Therefore, the contract said absolutely nothing about the position of walls or other features, including wall heights.

The contract referred to changes made to the draft strata plan which detrimentally affected the property giving the purchaser a right to rescind. The court held that the building of the wall did not detrimentally affect the property as shown on the plan because the plan showed nothing about the wall whatsoever. The property as built was basically the same as what was shown in the draft strata plan. The physical aspects of the building were not particularised in the contract, only the positioning of the boundaries and the area of the property.

The court held that the vendor was entitled to build the wall which obscured a large part of the view from the downstairs premises and that what was purported to be sold to the purchaser was in fact what was constructed, namely an apartment of a particular location and size, with two car spaces.

Therefore, the purchaser's purported rescission of the contract was in fact unsuccessful.

The court then looked at the issue of the damages to which the vendor was entitled. The vendor sought holding costs but the court held that the vendor was not entitled to claim the holding costs. All the vendor was entitled to was any loss on resale, actual expenses such as rates and taxes and particular costs that arose by virtue of the purchaser's default (for example legal costs).

As the vendor had not proved any damages other than expenses of $22,000, it was not entitled to an award for damages particularly when the developer had received more than twice that amount in rental during period since the purchaser's default.

The matter did not end there. The purchaser sought a refund of the deposit under section 55(2A) of the Conveyancing Act. The court held that the fact that a model was displayed and that the agent had represented that there would be 180 degree water views were matters that entitled the court to find that it would be unjust or inequitable to allow the developer to keep the deposit and therefore the deposit was ordered to be refunded to the purchaser.

This case is instructive for both developers and purchasers.

There must be certainty as to what the purchaser is buying and any specific representations made must be clearly set out in the contract.

However, if the court feels that the vendor's conduct is unfair in the circumstances and that its reliance on a very tightly drawn contract to the detriment of a purchaser is inequitable, the court always has the power to order a return of the deposit.

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Contamination and misrepresentation by silence

The matter of *Vitek v Estate Homes Pty Limited* involved a sale by Mr and Mrs Vitek to a developer of a site which they used for a car alarm business at Redfern.

The site was formerly used as a petrol station and the owners had a report that stated that there may have been contamination on the site by virtue of underground storage tanks (which had been sealed) and the use of the premises as a service station in the past. This information was known to the owners by virtue of them putting in a development application to Council in 2001 to extend their business premises (which they ultimately did not proceed with).

The contract contained a number of standard special conditions which, among other things, stated that the purchaser acknowledged having inspected the property, that the purchaser had not relied upon any representations of the vendor and that the purchaser took the property as inspected.

The property was sold on the basis that there would be a delayed settlement during which time the purchaser was to apply for a development application. However, the contract was not to be in any way subject to the obtaining of a development application by the purchaser.

The vendor had attached to the contract all of the statutory annexures including a zoning certificate. The zoning certificate stipulated that no orders had been made in respect of contamination.

The purchaser was unable to settle and it appears that part of the reason the purchaser was unable to settle was due to it being unable to obtain finance.

The purchaser alleged that it was entitled to rescind the contract due to the vendor not having made the purchaser aware of the contamination or potential contamination, and the fact that the property was previously used as a service station.

The court held that, even though the vendors had superior knowledge to the purchaser, there is no legal requirement for the party having superior knowledge to pass that knowledge onto the other party to a contract. When looking at claims of misrepresentation due to silence, the court must have regard to what was not said in the context of what was actually said and inequality of information is not of itself sufficient to constitute a misrepresentation by way of silence.

The purchaser failed in its claim to be entitled to rescind the contract or to be entitled to orders under section 42 of the *Fair Trading Act* with regards to misleading and deceptive conduct because of the following factors:

- Any person having regard to the physical characteristics of the property would have been put on notice that the premises were former service station premises.
- The special conditions in the contract made it clear that the purchaser had to satisfy itself as to what it was buying.

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- The vendor had complied with the mandatory disclosure requirements under the *Conveyancing (Sale of Land)* Regulations and was not statutorily bound to provide anything other than what was contained in those regulations. The report from Douglas & Partners that the vendors had obtained did not state that the property had contamination but only that, having regard to its former use, there was a possibility of contamination and in fact, at the trial, there was no evidence that the premises were actually contaminated or the extent of any possible contamination.
- The purchaser was a developer and its principle director had not only developed properties himself, he had acted as a consultant and project manager for others and was experienced in making enquiries of councils and other relevant authorities.

The court's attitude was that the way the contract had been framed, particularly stating that the purchaser had relied on its own inspections of the property and purchased the property with any defects, latent or patent, meant that the purchaser was put on notice before it entered into the contract that it had the responsibility to look out for its own interests.

Therefore, the purchaser's claim failed and the purchaser was ordered to pay significant damages as well as forfeiting its deposit, which cost the purchaser in excess of $600,000.

This case highlights that general provisions putting the purchaser on its own enquiry as to relevant matters can be effective. However, if the vendor has specific knowledge, it must disclose this knowledge. It is always best, if in doubt, to disclose matters on the basis that the purchaser is aware of the disclosures and has satisfied itself with respect to all matters relating to the issues disclosed and does not have any claim against the vendor with respect to those matters.

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