Property Newsletter

December 2010

In this issue

Christmas greeting

On behalf of all in the Property & Development Group at CBP, I wish you a restful, happy and enjoyable Christmas and every success for 2011.

I hope that you have found the Property Bulletin and the Leasing Bulletin of interest during 2010 and look forward to providing articles and information of use and interest to you in 2011.

Thank you for your support during the year and I look forward to our group continuing its association with you in 2011 and beyond.

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Biodiversity credits

The Office of State Revenue has issued a new revenue ruling in relation to the biodiversity banking and offset scheme that operates in NSW under the *Threatened Species Conversation Act 1995* (NSW). The scheme enables land owners to biobank sites to secure conservation outcomes and offset impacts on biodiversity values.

Credits are created by a land owner who establishes a biobank site. Land owners can sell the credits to developers. Developers may use the credits to offset impacts from development.

Biobank sites are established on each occasion that the Minister enters into a biobanking agreement with a land owner. The agreement is registered on the title to the land so that it is enforceable by and against successors in title.

The *Duties Act* charges duty on a variety of transactions including:

- a transfer of dutiable property (a "transfer" includes an assignment, an exchange and a buy-back of shares), and
- a statutory licence or permission under a NSW law, and
- a surrender of an interest in land in NSW.

The revenue ruling states that biodiversity credits are not regarded as being dutiable property. In particular, biodiversity credits are not:

- land or an interest in land in NSW, or

- a statutory licence or permission under a NSW law.

The ruling does not address whether or not biodiversity credits amount to a surrender of an interest in land in NSW. While biodiversity credits are not "an interest in land", whether a transaction involving credits constitutes a surrender of an interest in land is not expressly addressed. But it is not likely.

The ruling summarises the approach of the revenue office as one where "biodiversity credits are not regarded as being dutiable property" so that a transaction in respect of them will not be liable for duty.

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Representations as to views

Regular readers of this newsletter will recall our article in the May 2010 newsletter with regards to the matter of *Higgins v Statewide Developments Pty Ltd*, which dealt with views from a unit to be built at Rhodes.

In a similar Queensland matter (where the decision was handed down in September 2010), the tenants were buying a river front unit and were taken to the display unit.

The allegation in the matter of *Mirvac Queensland Pty Limited v Holland* was that an agent representative of the developer, when asked about the views from the unit to be built further along the river, which had extensive mangroves along that part of the river represented that the views would be basically equivalent to those from the display unit.

Mrs Holland also had concerns about security and was told that even though their unit was on the lower floor, security would not be an issue.

Mr and Mrs Holland had contracted to buy the unit for $2.455M but (probably because of the global financial crisis) by the time the unit was completed and settlement was required, the value of the unit was $1.5M.

Needless to say, having commissioned an independent expert to ascertain the value of the unit and having found the value had dropped substantially, Mr and Mrs Holland sought to withdraw from the contract.

The majority of the decision looked at the conflicting evidence of the plaintiff and the defendant with respect to what was said at various meetings (particularly what was said by sales personnel) in relation to the two issues in question being the views from the unit (viz-a-viz the mangroves) and the security of the unit.

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Ultimately, whilst the court held that the defendants were disappointed with the views that their unit gave them when completed in 2009, there had not been a positive representation by the developer that the views would be the same from their unit as they were from the display centre.

On the issue of security, the fact that the unit was built closer to the ground at one end and therefore perhaps presented a security risk was again held not to be sufficient to enable the purchasers to rescind by virtue of there being a lack of adequate security.

The cause of the defendants was not helped by virtue of the fact that in correspondence written by Mr Holland prior to completion of the unit in early 2009, he did not specify in that letter all that he was saying in evidence had been represented and which were alleged at the hearing as being material in persuading him and his wife to buy the relevant unit.

Ultimately, the developer succeeded in its decree for specific performance of the contract.

This case is instructive as to careful drafting of contracts in relation to representations and warranties, particularly where purchasers allege that certain specific representations had been made.

It occurs to us that, if developers have carefully drafted provisions which stipulate that there is no representation or warranty made by a developer which is not specifically set out in the contract, then the courts are likely to hold the purchaser has not satisfied its onus of proving representations allegedly made pre-contract and hold the purchaser to the contract or find that is liable in damages were it seeks to terminate the contract.

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Insurance interests

As many of you would appreciate, if you are a landlord or a mortgagee or a joint venturer, it is often a requirement that the party having the primary insurable interest has another party (for example the landlord, the mortgagee or the other joint venture partners) noted on the insurance policies as interested parties.

Most people assume that the parties noted are covered if a claimable event arises. The fact that this does not always occur is highlighted in the recent Victorian decision of *Secure Funding Pty Limited v Insurance Australia Limited*.

This involved a mortgage by the owner of a property at North Rothbury in New South Wales, with the mortgagee's interest noted on the policy.

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The property was damaged by fire and the mortgagee sought recovery under the insurance policy by virtue of its notation on the policy as an interested party.

Unfortunately for the mortgagee, it was proven that interests associated with the mortgagor had intentionally caused the fire which extensively damaged the property. The policy contained an exclusion from liability on the part of the insurer where a party who lived in the property or was lawfully on the property started a fire with an intention of causing damage.

The Court held that, in this instance, you must look at the wording of the policy as being determinant of liability (or absence of liability) of the insurer.

The mortgagee's contention that, even looking at the wording of the policy, one must rely upon the purpose or commercial objective of the policy. The Court held that it was obliged to construe each term of the policy so that it is consistent with the language and purpose of all of the provisions of the policy.

As a matter of construction, the policy excluded cover in the circumstances of the event which damaged the property and therefore the mortgagee was unable to recover the costs of reinstating the property.

It is important that a party rely on its interest being "noted on a policy" gives some consideration to having a forensic analysis carried out on the terms of the policy so that it knows what is covered and what is not (and where it is at risk by virtue of the conduct or actions by another party).

Alternatively, rather than only seeking a notation, the party seeking protection may wish to consider whether it could seek an extension of the policy to cover it in circumstances where a claim may otherwise be precluded due to the act, neglect or default on the part of the insured.

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