

Commercial Dispute Resolution Update

REIQ Contracts in the sale of Houses

The importance of properly invoking the conditions of the Standard Contract was recently emphasised by the outcome in *Lai & Anor v Soineva & Anor* [2011] QSC 247.

Background

The relevant contract in this case was the REIQ Standard Form 8th Edition for Houses and Residential Land.

Pursuant to clause 4.1, the contract between parties is conditional upon the buyer obtaining a written building report from a building inspector and a written pest report from a pest inspector on the property by the Inspection Date on terms satisfactory to the Buyer.

In this case, the Inspection Date was 28 June 2011.

On 21 June 2011, the buyers' solicitors advised the sellers' solicitors by facsimile transmission that:

"We are instructed to advise that our clients are not satisfied with their building and pest enquiries.

We have advised that it has been agreed that at settlement a bank cheque in favour of 'Pest-a-side Pest Management' in the sum of \$4500 will be handed over.

Kindly confirm that these are also your instructions."

On 28 June 2011 the sellers' solicitors sent a facsimile transmission in response stating "our client does not agree..."

On 29 June 2011 the real estate agent (the **agent**) transferred \$4,500 into the buyers' solicitors' trust account. There was no suggestion that the agent was acting other than on his own account. In fact, the sellers did not instruct or otherwise authorise the payment made by the agent.

On 29 June 2011, after receiving the payment from the agent, the buyer's solicitors sent a facsimile to the sellers' solicitors advising that their clients are "satisfied with the Pest and Building Condition of the Contract."

On 30 June 2011, the sellers' solicitors wrote to terminate the contract noting the "buyer can no longer give an effective notice of 'satisfaction' under Clause 4.2 once the Inspection Date has passed."

The Application

The buyer sought specific performance of the contract.

Justice Dalton held that a buyer does not have a right to give notice of satisfaction under clause 4.2(2) after 5.00 pm on the Inspection Date.

The buyer contended that the facsimile sent by their solicitors on 29 June 2011 amounted to a waiver of the benefit of clause 4.1 within the meaning of clause 4.5 of the Standard Contract.

Her Honour held that for written notice under clause 4.5 to be effective, it did not have to contain the word “waiver” or “waive”. But Her Honour found that, given the express requirement for a written notice of “waiver”, the words used in a clause 4.5 notice need to be an unequivocal communication of intent that the buyer chooses not to terminate the contract pursuant to clause 4.2(1) and gives up any remaining benefit it has under clause 4 of the contract.

Outcome

It was held that the facsimile sent on 29 June 2011 was worded in respect of being “satisfied” under clause 4.2 rather than as a “waiver” under clause 4.5, or was ambiguous and thus not sufficient to amount to a notice pursuant to clause 4.5 that the buyers ‘waive’ the benefit of clause 4 of the contract.

On this basis, the sellers were entitled to terminate the contract as at the time they sent the facsimile of 30 June 2011.

The relief sought by the buyers was refused.

Lessons

Careful reference to contract conditions cannot be underestimated, even in “standard” provisions in everyday dealings.

This case is a reminder of the old adage that it is safest to use the language of the contract when giving notices pursuant to the Contract.

**This article was produced by Herbert Geer Lawyers.
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