YOU AND YOUR PROPERTY

IN EACH ISSUE RESIDENTIAL PROPERTY LAWYER, MICHAEL HOFMANN-BODY COMMENTS ON A PROPERTY CASE WHICH HAS COME BEFORE THE COURTS. IN THIS ISSUE LOOKS AT THE CASE OF JAMES DEVELOPMENTS LTD V MANA PROPERTY TRUSTEES.

During the recent property boom many people speculated on property. A popular investment model was to buy a unit or home in a development. The purchaser would buy "off the plans" and pay a small deposit. If the developer was able to obtain sufficient pre-sales they would start the development. The development was usually completed two to three years later. Once complete and a title had issued for the property, the developer required the purchaser to complete settlement. The purchasers hope was the market would rise in the intervening period and they would be able to realise a capital gain. Some would immediately sell to realise the gain. Others would hold the property to obtain rental income and in the hope further capital gains may arise over time.

Usually, it was only once the development was complete the purchaser got an opportunity to inspect the reality behind the designs described in the plans. In my experience purchasers will, on occasion, discover there was a gulf between their expectations and the property they actually agreed to purchase. When the gulf is too wide, one of the reactions is to ask me whether there is a right to cancel the agreement.

The case of ***James Developments Limited v Mana Property Trustee*** was recently heard in the Court of Appeal. The question of when a party has a right to cancel was specifically addressed. The case revolved around land to be subdivided and whether the words *"The parties acknowledge that the final area of the property as shown on the approved survey plan must not be less than 4.7150ha"* gave the purchaser the right to cancel the agreement if the actual area of the subdivided land was less than the prescribed 4.7150ha. The actual area was only 171m2 (or 0.4 per cent) less than 4.7150ha. James Development Limited cancelled the agreement. The following day Mana offered to rectify the lot size and made arrangements for the lot to be increased in size within two weeks. There was no evidence submitted that the reduction in area was of any importance to James or that it would diminish the value of the land (as the purchase price was to be calculated based on a square metre rate).

The case turned on whether the words were essential to the purchaser. If a term of a contract can be demonstrated to be "essential" to a purchaser a basis for cancellation arises. The agreement specifically provided for the purchase price to be adjusted if the area was more or less than that recorded in the agreement. Testimony was given the purchasers were made aware by the Vendors of the smaller area well before settlement and raised no objections.

In the High Court Associate Judge Osborne found the evidence did not suggest the particular words were essential to the purchaser and as such the only remedy available to the purchaser was a reduction in the purchase price.

The Court of Appeal was asked to consider whether the Associate Judge had erred in law. The appeal court found the word "must" meant it was essential to the parties and as such the purchaser was within its rights to cancel notwithstanding the breach was commercially immaterial to the purchaser. The wording of the clause in question allowed the purchaser to cancel its agreement in this instance. However, like provisions are not always as explicit as this. Often a purchaser will be compelled to argue there was an implied term in a contract to substantiate an attempt to cancel a contract. Not only will the party seeking to cancel have to prove the existence of the implied term but also that the implied term was essential to them.

If a purchaser cancels a contract without legal basis, the downside is potentially significant. The party cancelling may be liable for any losses incurred by the other party as a result of the failure to settle. Those losses include any subsequent reduction in sale price or any other additional costs incurred as a result of the failure to settle.

What can we learn from this case? First, before you seek to cancel a contract you need to be sure of your legal position. Always take legal advice. Secondly, if you are entering into any contract thoroughly consider what is essential to you before you sign the agreement. If a term is essential to you then include it in the agreement. As a general rule parties to agreements do not usually review the legal documents in any detail until something has gone wrong and they are no longer on speaking terms. At that point the agreement is only document that can speak for them. When signing an agreement consider whether you could rely upon the wording in the event that gulf between expectations and reality is too wide.

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