GREENS BREAKFAST PROPERTY LAW UP DATE OCTOBER 2017

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SUMMARY.

1. HEY DUDE WHERE IS MY CAR PARK?

Section 9AC Sale of land

Off the plan and material change. Car stackers

2. KISS IT GOODBYE. DEPOSITS FORFEITURE AND PENALTIES.

10% deposit, discretions under PLA ,

3. IMPLIED TERMS

What a reasonably well informed by stander would make of the terms

Implied obligation to act in good faith.Discretion to order repayment of deposit.

4. VCAT JURISDICTION.

Sale of Land Act and consumer protection. Sect 32 and damages?

1. HEY DUDE WHERE IS MY CAR PARK.

1.1 Section 9AC of SOLA requires the vendor to give notice of changes to the plan of subdivision in off the plan sales.

1.2 This is not limited to material or substantial changes…it is changes made to the plan by the vendor.

1.3 The purchaser had 14 days from the date of notice given to rescind if the change is material.

1.4 The cases…Besser, Lockwood, Freeland Smalls.

1.5 Lockwood. 2013 VSC 10,

Justice Judd. Contracts for 4 residential units and 4 carpark units, 8 separate contract.

The carparks did not materialise. The vendor offered 99year leases of the car park space on common property.

The purchasers, mother and daughter, each said they wanted 2 residential units and 2carparks.

The judge had no trouble in finding the 4 contracts for the 4 carpark units were properly rescinded. Indeed this was admitted on the morning of the case opening in the Supreme Court.

But the developer argued the residential units were built and supplied and there were separate contracts for same. There was no significant change to the residential units so it was said they should be enforced and the deposits forfeit.

The judge said the residential units were on a completely different plan of subdivision anyway. They were initially on a plan with freehold carparks sold off the plan. Now those areas were just common property so they were on a different plan and a materially different plan.

He also said there was a problem for the developer vendor as the 8 contracts were all signed up together and in doing so they were related to each other. It was clear the residential units were matched with car park units and so they were different in that no matching units were available.

Deposit refunded. Plus interest. Plus costs. Material change for all.

1.6. Ausgrand v Freeland-Smalls . 2016 VCC 942.

Judge McNamara finds changes are material.

Again daughter buys a unit with a car park, and mother buys a unit for the superfund with a carpark. The plan of subdivision has provision for 12 visitor carparks. These are marked as visitor carparks on the plan.

The vendor finds he can add 3 more units, one on the otherwise top story, beside the former penthouse, and another new penthouse on top of the expanded former top floor.

He also takes 6 of the car spaces shown as visitor spaces and applies those to his own new units.

The judge finds there is material change.

There was also a change to the carpark provided to one unit…as it became a changed configuration in the basement and the carpark previously slightly larger and beside or between 2 other carparks was changed to be beside a wall. His honour recalled the carparks beside walls were the last to be taken in public carparks….the wall is immoveable and right on the boundary. Being beside another car space is preferable.

Deposits refunded and interest and costs ordered.

Vendor refused to deal with one contract and insisted on pleadings and full hearing. Summary determination under SC rules not utilised. Costs claimed in excess of $50K for hearing.

1.7 CARSTACKERS

The LTO apparently is finding ways to deal with carstackers.

A plan which shows specific car spaces on a car stacker can be registered. The space is that shown on the stacker as allocated to the lot.

There are usually easements for access to the stacker across common property. There are also easements associated with the movement of the car stacker where vehicles travel through space allocated to another owner, or the OC common property.

There are the usual issues of who pays for the maintenance and control of the car stacker. The right to utilise same may be compared to use of lifts and payment for same.

It is like the old question: Why should the ground level owners pay for lift maintenance and repair, and associated insurance??

Why should non carstacker users pay for the carstacker expenses. Etc. OC issues, Budget issues.

Second OC required. Carstacker installed and licence to use??

99 year lease of use of car stacker?? Material change if not part of the lot??

2. KISS IT GOODBYE. DEPOSITS FORFEITURE AND PENALTIES.

2.1 In **SIMCEVSKI V DIXON [NO.2](AND LTO). 2017 VSC 531** Justice Riordan considered the forfeiture of 10% of the purchase price, or more specifically a further 5% under a sale of land contract.

2.2 The purchaser had purchased an old service station site for $3.5M. He paid a deposit of 5%. And the contract was modified to say that if he did not settle on the due date then a further 5% would be forfeited on rescission of the contract.

2.3 The argument raised (by the learned Rimmer ??) was that this additional 5% forfeiture was a penalty and unenforceable.

2.4. The classic penalty authority is Dunlop Pneumatic Tyre Co …1915 AC 79.

This established the principle that the courts will not enforce a penalty. What is a penalty is fully explored by recent High Court authority. See Paciocco v Australian & New Zealand banking Group Ltd..2016 (258 CLR 525.

See also Nicholas Gallina paper on penalty clauses and that decision and the way the courts have dealt with penalties over the years. Greens breakfast 21 September 2017.

2.5 My early exposure to this was with mortgages. I ran a small contributory mortgage practice for some time. We charged a bit above bank interest and lent only 50% of the property value. But critically we lent at 10, or 12 %, and stated the lower rate was 8% or 10% respectively. This was to avoid the argument that the higher rate was a penalty. The rate was the higher rate. But for prompt payment we would take the lower rate. Penalty avoidance in action.

2.6 Deposits are a bit different to other payments. The principles are different for penalties also.

His honour found the obligation to pay the further 5% was in the nature of a penalty. He refused to enforce it. See para 32 "… cl 28.4(a) of the contract imposes an unenforceable penalty;".

The change to the standard contract was to modify clause 28 and say if the purchaser defaulted …"10% of the price is forfeited." This involved striking out the usual words " the deposit up to…." Appearing before the word "10%".

It can be noted there is authority that 10% in property contracts is generally not a penalty. This may be said to be an exception to the general rule. His honour was of the view that merely adding the modification as was done was not sufficient to have the character of the sum forfeited changed to that of a deposit.

2.7 Some NSW Court of Appeal case law supported the proposition that such a change was insufficient. See paragraphs 31 of the judgement. There was no genuine pre-estimate of the damages flowing for a breach. Just another 5% added to the deposit. But "… does not limit the Vendor's right to claim damages to the extent they exceed that payment."

PROPERTY LAW ACT RELIEF AGAINST FORFEITURE.

PRINCIPLES. CIRCUMSTANCES AND THE LAW.

2.8 Note there is also extensive discussion of the circumstances in which a defaulting purchaser may seek relief under section 49(2) of the Property Law Act.

2.9. The vendor in this case did the bore hole tests required shortly after rescinding the contract. The property was substantially clear of contamination. He resold for $4.6m, a windfall of $1.1M.

2.10 The court was not moved to exercise it discretion by that circumstance. See para 118 for the applicable principles.

No discretion exercised in favour of the purchaser.

2.11. IMPLIED TERMS

Simcevski v Dixon [No.1] 2017 VSC 197.

See this for circumstances relevant to implied terms

Also re obligation for a party to act in good faith to enable the contract to be implemented.

3. VCAT JURISDICTION IN SOLA MATTERS

VCAT ABLE TO HEAR BREACHES OF SALE OF LAND ACT.

SM Vassie in Wagner v Usatov. Civil Claims 2014 VCAT 1198.

Breach of Sale of Land Act.

Vendor entered into 173 agreement and failed to disclose.

Breach of sect 32 obligations.

The purchase had settled. By application the 173 agreement was later set aside in the VCAT planning division.

The planning permit which calls up a sect 173 agreement was found to be an approved proposal.

Sect 32 was breached by it not being disclosed.

Section 48A of SOLA draws on Australian Consumer Law and Fair Trading Act. Between the 2 statutes a person who suffers a loss from the contravention of SOLA may bring a proceeding at VCAT.

So it is said any loss suffered because of the failure to disclose is compensable.

Order for $5,048.39.

This is a possible quick and cheap way to move on such matters.

Generally it was thought a breach of sect 32 sounded only in rescission. May it also give damages??

Mitch McKenzie

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