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Valuers' and agents' liability issues

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contents

81	Valuers' and agents' liability issues
87	Rights of waiver and termination for contingent conditions — it's all in the drafting
90	Precision required in exercise of options
91	Trade Practices Act trumps contractual rights

This article examines some recent cases and developments relating to the liability of valuers acting in a professional capacity, as well as some broader issues of liability for real estate agents. In preparing the original outline, a number of articles and casenotes appearing in earlier issues of the *Australian Property Law Bulletin* were helpful guides.

Courts in both Australia and England have been reluctant to second guess independent valuations of property, including valuations for rent review purposes. But it is clear from decisions in both jurisdictions that where a valuation is made negligently, a valuer may be liable in damages.¹

This article:

- outlines the principles of negligence that are applied by courts in valuers' negligence cases by reference to some recent decisions;
- identifies some of the factual circumstances which may give rise to a negligence claim against a valuer, including by third parties;
- identifies other potential heads of claim against valuers and agents, including misleading or deceptive conduct and misrepresentation;
- discusses the effectiveness of disclaimers; and
- briefly notes potential limitations on liability, including contributory negligence and the existence of concurrent wrong doers.

Negligent misrepresentations

The law relating to negligent misrepresentations developed in the 1960s. It is part of a distinct area of negligence law where liability can be established in relation to pure economic loss, as compared with personal injury or damage to or loss of property.²

Where there is a duty of care in a professional relationship in which there is reliance by one party on the skill and expertise of the other, a breach of that duty may be established, on the particular facts of the case, on the basis of a general formulation (the *Shirt* calculus) which has been developed in Australian courts following the lead of the High Court.

The overwhelming requirement in the application of the formulation is the obligation to exercise reasonable care in the factual context in which the particular claim arises. In extreme cases, recklessness or even maliciousness will negate a claim of the exercise of reasonable care. In less clear-cut cases, to omit to do something which an ordinarily prudent valuer or other professional would do may establish negligence.

In pure economic loss cases, there are some additional factors which the courts have regard to, including the vulnerability of the plaintiff; the ascertainability of that vulnerability by the defendant; and the fact that any consequent liability by the defendant was not indeterminate.³



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As claims based on negligent valuations began to come before courts in England and Australia in the mid-1970s, two issues emerged. The first, that valuers could be under a duty of care to third parties — for instance, lenders — where the valuation was commissioned by a borrower, was settled quickly and has been routinely applied. The second issue has been referred to as the ‘margin of error’ principle.

Margin of error principle

The margin of error principle was explained in an English decision in 1977 as follows:

The valuation of land by trained, competent and careful professional men is a task which rarely, if ever, admits of a precise conclusion. Often beyond certain well founded facts so many imponderables confront the valuer that he is obliged to proceed on the basis of assumptions. Therefore, he cannot be faulted for achieving a result which does not admit of some degree of error. Thus, two able and experienced men, each confronted with the same task, might come to different conclusions without any one being justified in saying that either of them has lacked competence and reasonable care, still less integrity, in doing his work. The permissible margin of error is said [by the expert witnesses] to be generally 10 per cent either side of a figure which can be said to be the right figure, i.e. so I am informed, not a figure which later, with hindsight, proves to be right but which at the time of valuation is the figure which a competent, careful and experienced valuer arrives at after making all the necessary enquiries and paying proper regard to the then state of the market.⁴

The NSW Court of Appeal⁵ has recently commented on the 10 per cent margin of error concept, noting that it is not a statement of principle that no valuation within the 10 per cent bracket can as a matter of law be negligent. While there is a prima facie inference that a valuation within the margin is not tainted by negligence, in some factual circumstances a valuation may be made negligently even though it is within the 10 per cent margin.

The onus of so proving is on the person claiming that the valuation was made negligently.

In his recent article ‘Riding the market: 20 years of valuation negligence’,⁶ John Murdoch, Professor of Law at Reading University, argues that a review of the margin of error concept is long overdue. It is anomalous because it is the only area of negligence where a court is prepared to use the outcome of a professional activity (the valuation figure) as evidence for or against a finding of negligence. The concept has no satisfactory intellectual foundation and apparently no scientific basis. There is a small body of research into valuation variations, to which Murdoch’s article refers, which does not support the margin of error concept as it is applied by the courts.

Negligent valuation

As an example of a negligent valuation, consider the facts of the 1999 High Court decision in *Kenny and Good Pty Ltd v MGICA (1992) Ltd*.⁷ Kenny and Good Pty Ltd was a property valuer engaged by a bank to value a residential property for the purposes of calculating the amount of mortgage finance the bank was willing to lend. The valuation was done while the building work was in progress, concluding that its present value was \$5.35 million and on completion would be \$5.5 million, and suitable as security for a loan of 65 per cent of the valuation for a term of three to five years. The valuation report stated that the mortgage insurer ‘may’ rely on it in the same way as the lender. In May 1990, the bank lent \$3.575 million. MGICA insured the loan.

In June 1991, the property owner defaulted under the mortgage and a sale by the bank was completed in January 1992 when, as a result of a fall in the residential property market, \$2.65 million was obtained. MGICA, having indemnified the bank, sued Kenny and Good Pty Ltd alleging negligence; breach of contract in failing to exercise due care and skill; and breach of provisions of the *Trade Practices Act 1974* (Cth) dealing with misleading or deceptive conduct and

false or misleading representations in trade or commerce. The High Court unanimously found against Kenny and Good Pty Ltd in both negligence and under the *Trade Practices Act*.⁸

According to members of the High Court, the valuer's duty was a duty to exercise reasonable care to enable the lender to decide whether to enter into an insurance transaction. Where a valuer is asked to provide a present valuation, future circumstances must be taken into account where they are reasonably foreseeable — for instance, a reasonably predictable downturn in the property market generally or specifically.

Where an unpredictable and, accordingly, unforeseeable decline occurs, a valuer will not be liable in negligence. However, in the circumstances of this case, what was fatal to the position of Kenny and Good Pty Ltd was the inclusion in the valuation of the words 'to the extent of 65 per cent of our valuation for a term of 3–5 years'. That amounted to a representation that the property would have sufficient value to enable the lender to recover the amount lent (and interest) throughout the specified period and extended to the claim by the mortgage insurer.

Therefore, in considering the exercise of reasonable care in making a valuation, the courts will address, in appropriate circumstances, issues such as the foreseeability of risks which may impact on the making of a valuation; questions of causation (were other factors, outside the control or the reasonable foreseeability of the valuer, the cause of the loss?); the remoteness of the damage when considered in its total factual context; and contributory negligence by the plaintiff. The effect of proportionate liability legislation is also discussed below.

Intervening acts of the plaintiff

*Walker v Henville*⁹ was an action for misleading or deceptive conduct under s 52 of the *Trade Practices Act*. Walker, who was a real estate agent in business in Albany, in south-western WA, represented to Henville, an architect and property developer, that there was

a lack of upmarket quality home units in the Albany area. He put a proposal to Henville about building units on a piece of land, proposing that they would sell in the range of \$250,000–\$280,000. Henville purchased the property and constructed three quality home units on it, but sold them for a total price of \$545,000, with the costs of development amounting to \$846,846. Henville claimed damages in excess of \$300,000, being the difference between his costs and the net proceeds.

The trial judge found in favour of Henville, although concluding that there were other causes of the loss, including carelessness on the part of Henville and an adviser in calculating the costs of the development and other factors which led to the cost of construction being significantly greater than Henville expected.

Walker appealed to the Full Court, denying that there was a causal connection between his misleading conduct and the loss. The significant issue on appeal was the interpretation of the principles of causation — whether Henville's losses were caused 'by' Walker's misleading conduct. That question is essentially a matter of fact resolved on the probabilities as a matter of common sense and experience.

The court decided that Henville's carelessness in relation to the feasibility study did not prevent him from discovering that Walker's representations were inaccurate. Further, the study operated as a subsequent inducement to undertake the development, which was entirely unrelated to Walker's misrepresentation. Therefore, Henville's 'folly' in relation to the feasibility study operated as a subsequent, separate and entirely independent inducing factor. Intervening circumstances broke the chain of causation leading from Walker's misleading or deceptive conduct. The appeal was allowed.

Disclaimers

One significant aspect of misleading or deceptive conduct cases is that liability cannot be waived or disclaimed, except in limited

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circumstances. One example is where information is simply being passed on by a third party to a person who may rely on it. See, for instance, the High Court's recent decision in *Butcher v Lachlan Elder Realty Pty Ltd*.¹⁰ A brochure for the sale of residential property, prepared by the estate agent, included a survey diagram obtained from the seller's solicitors. It was inaccurate. The brochure contained a disclaimer which read:

All information contained herein is gathered from sources we deem to be

believed me when I misled you'). The courts do not view this argument favourably.¹²

However, the way in which a valuation can be used may have the effect of limiting liability. For instance, in *Kenny and Good Pty Ltd* a negotiation by the valuer to exclude the reference to the life of the valuation may have excluded the responsibility to consider, in a reasonably competent manner, what the property market may have done during that period. Limiting reliance on the valuation to a strictly

There are cases involving negligence and misleading or deceptive conduct where a defendant argues that the plaintiff failed to make appropriate enquiries about the subject matter of representations ('you should not have believed me when I misled you'). The courts do not view this argument favourably.

reliable however, we cannot guarantee its accuracy and interested persons should rely on their own enquiries.

By a narrow majority, on the particular facts of the case, the High Court decided that the disclaimer was effective to protect the estate agent from a misleading or deceptive conduct claim.¹¹

The limited circumstances in which disclaimers may operate will not, however, protect valuers in giving valuations on a commercial basis. Generally, where a valuer is engaged to provide a valuation for a fee, it is difficult to imagine how a disclaimer could be effective against liability in negligence. There are cases involving negligence and misleading or deceptive conduct where a defendant argues that the plaintiff failed to make appropriate enquiries about the subject matter of representations ('you should not have

defined period from the date on which it takes effect and expressing the specific use to which it may be put by the client and third parties, or setting out the exact terms of the engagement by the client, may be effective in limiting exposure to legal liability.

Forecasts and knowledge of impacts

In this regard, careful attention is required when issuing forecasts to avoid misleading or deceptive conduct, noting particularly the obligation to correct information where countervailing information comes to hand, as well as the liability that may arise as a result of remaining silent about a relevant fact.

In the recent High Court decision *HTW Valuers (Central Qld) Pty Ltd v Astonland Ltd*,¹³ the court found a real

estate valuer liable for breach of duty and contract, in tort and under s 52 of the *Trade Practices Act*, for failing to qualify advice about the impact that a new shopping centre might have on an investment property purchased by its client. The property was a small shopping arcade. The valuer gave written advice about the retail rental levels in the area, stating that, although a new shopping centre was to be built close by, current rental levels were maintainable. Within four years of the purchase, the previously fully tenanted shopping arcade had lost 75 per cent of its value; the rate of tenancies and the level of rents had collapsed; and the arcade was unsaleable.

The High Court judgment makes clear that, while unexpected competition may be a supervening event interrupting a causal link between valuation advice and a subsequent loss, expected competition is not. In the circumstances, the decline in the value of the arcade property was inherent and the surrounding circumstances, known to the valuer, involving the building and impending opening of the new shopping centre were crucial. The measure of damages was the difference between the purchase price and the property's real value calculated after the impact of the event, which should have been taken into consideration by the valuer.

Puffery

Exaggeration and hyperbole used in real estate advertising, designed to attract prospective purchasers to view the property, are often not intended to be or capable of carrying a misrepresentation of fact. In *Mitchell v Valherie*,¹⁴ the relevant advertising used the words 'cosy-immaculate style' and 'nothing to spend — perfect presentation'. By a majority, the Full Court of the Supreme Court of SA overturned the trial judge's decision that there had been a misrepresentation of fact.

Layton J said:

... I consider that 'Perfect' is an exaggeration such as would amount to puffery. The word 'Presentation' is similar to the word 'Style' in the overall

context and when combined with the word 'immaculate', has a subjective connotation, as 'Immaculate Presentation' to one person may not be so regarded by another. I do not consider that this phrase conveys a representation of fact.¹⁵

Silence

A recent bizarre situation in NSW illustrates the perils of remaining silent about facts or circumstances which would be likely to affect a prospective purchaser's decision to buy a particular property. Estate agents sold the family home of Sef Gonzales without disclosing the fact that Sef had murdered his parents and sister in the house. After learning the facts, the purchasers, who were devout Buddhists, attempted to rescind the purchase agreement on the basis of the non-disclosure and the fact that they believed the house would be haunted and would cause them misfortune. The agents eventually returned the deposit under the pressure of press coverage, but insisted that they had no obligation to disclose the house's history unless they were directly asked. They were subsequently fined more than \$20,000 after an investigation by the NSW Office of Fair Trading.

The agents applied for a review in the Administrative Decisions Tribunal (the Tribunal) of the decision by the Commissioner of Fair Trading's delegate to impose the fines. In *Hinton v Commissioner for Fair Trading*,¹⁶ the Tribunal affirmed the breaches by the agents of various statutory provisions by concealing a material fact; engaging in misleading or deceptive conduct; and failing to act honestly, fairly and professionally. There were further proceedings to consider whether the disciplinary action was excessive and reasons affirming the original decision were subsequently handed down.¹⁷ In its reasons affirming the original penalty decisions, the following comment about the position adopted by the agents during the hearing was made by the Tribunal:

Their view of their obligations as selling agents impressed me as one in which they embraced the maxim caveat

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emtor (let the buyer beware) with mercantile vigour, and showed little understanding of their wider obligations as agents ... my clear impression of both of them was that they could not conceive why it might have been fair to disclose the property's history to prospective purchasers, let alone their professional duty might have been to do so. They were fixed in the belief that the fact that a notorious triple murder had occurred at the property, could not affect the property, and was not a material consideration. In this I have found they were wrong.

Proportionate liability

Since 2003, there has been a substantial legislative change in all Australian jurisdictions which may affect the position of defendants in negligence, breach of contract and misleading or deceptive conduct cases. Provisions allowing for proportionate liability in, for instance, the *Civil Liability Act 2002* (WA) enable defendants to join others who they allege are partly responsible for acts of negligence or misleading or deceptive conduct, with the ultimate effect that a particular defendant will have his or her proportionate liability assessed by the court even though some of the alleged concurrent wrong doers are not parties to the action.

Government valuations

It is interesting also to note that valuations made by government officials under valuation of land legislation may also be disputed, although the basis of invalidation will not be negligent or misleading or deceptive conduct but a failure to determine the value in accordance with law. In *Maurici v Chief Commissioner of State Revenue*,¹⁸ the facts which supported the invalidity of the valuation included the undue selective nature of the comparable sales of land in the relevant area and the disregard of reasonably contemporaneous sales of comparable improved land in circumstances where there was a scarcity of vacant land. Similar acts or omissions by

valuers in the private sector may, in appropriate circumstances, establish negligence. ●

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Endnotes

1. See Cameron M and Blom J 'Valuation may be an art, not a science, but negligent valuers can be sued!' (2000) 14(8) *APLB* 79–80.

2. See, for instance, *Evatt v MLC* (1968) 122 CLR 556 (HC); (1970) 122 CLR 628 (PC); and, more recently, *Perre v Apand Pty Ltd* (1999) 164 ALR 606.

3. *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 619 [50] (McHugh J) and 616 [38] (Gaudron J).

4. *Singer & Friedlander Ltd v John D Wood & Co* [1977] EGLR 84 at 85 (Watkins J).

5. *Adwell Holdings Pty Ltd v Smith* [2003] NSWCA 103; BC200302049 at [9] (Meagher JA, Mason P and Buddin J agreeing).

6. (2005) 21(4) *Professional Negligence* 233.

7. (1999) 199 CLR 413.

8. This and the previous paragraph are drawn from the article cited above at note 1.

9. [1999] WASCA 117; BC9904528.

10. (2004) 218 CLR 592.

11. For comment on this decision, see Wilson T 'Disclaimer effective in s 52 Trade Practices Act decision' (2005) 20(10) *Australian and New Zealand Trade Practices Law Bulletin* 145–47 and Dixon B 'A glossy colour brochure divides the High Court' (2005) 19(7) *APLB* 77–81.

12. See Murdoch J 'Client negligence: a lost cause?' (2004) 20(2) *Professional Negligence* 97.

13. (2004) 217 CLR 640.

14. [2005] SASC 350; BC200506803.

15. Above at [117].

16. [2006] NSWADT 257. See O'Shea K 'Tribunal upholds fines for non-disclosure of a property's crime scene history' (2006) 21(3)&(4) *APLB* 34–36.

17. *Hinton v Commissioner for Fair Trading (No 2)* [2006] NSWADT 299.

18. (2002) 212 CLR 111.

Rights of waiver and termination for contingent conditions — it's all in the drafting

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The right of a contracting party to waive the benefit of a contingent condition before or on the date for fulfilment of the condition has always been clear. A right of unilateral waiver depends in the first instance on whether the condition is for the sole benefit of the party, and in the second instance on whether the contract expressly alters that right (*Perri v Coolanagatta Investments Pty Ltd* (1982) 149 CLR 537). The right of a party to waive after the date for fulfilment of the condition, in the absence of an express right in the contract, has been more vexed.

Although various views have been expressed in previous authorities, until the Queensland Court of Appeal decision in *Donaldson v Bexton* [2006] QCA 559; BC200610679 the question had not been determined authoritatively by any other Australian court. By a majority decision, the Court of Appeal decided that the buyer could not waive the condition after the date for fulfilment, even though a purported waiver prior to the date would in the court's view have been effective. This was primarily as a result of the drafting of the condition and the finding by the court that the condition gave both parties a right of termination for non-fulfilment of the condition. This decision raises several important considerations for practitioners in the drafting of contingent conditions.

Facts

In *Donaldson v Bexton*, the contract was subject to the sale of a parcel of land owned by the buyer within 30 days of the contract date. The condition provided that if the land was not sold within this time, the 'contract will be at an end'. The 30 days referred

to in the special condition ended on 27 December 2006. The trial judge refused to make a ruling that the buyer's purported waiver of the benefit of the condition on 3 January 2007 was effective to deny the validity of the seller's termination on 5 January 2007.

Appeal

The buyer appealed against this finding, arguing that their purported waiver was effective and consequently any right that the seller may have had to terminate was extinguished.

Both the buyer and the seller conceded as part of the appeal that, as the land was not sold within 30 days, either party was entitled to terminate the contract. This concession was based upon the decisions of the High Court in *Suttor v Gundowda* (1950) 81 CLR 418 and *Gange v Sullivan* (1966) 116 CLR 418, both of which held in relation to a similar clause that either party had the right to terminate if the condition was not fulfilled. Neither case dealt directly with the issue of waiver by the buyer after the date for fulfilment.

Each member of the Court of Appeal delivered a separate judgment.

Reasons for dismissing the appeal

Keane J gave the lead judgment for the majority. His Honour approached the question of whether a party could waive the benefit of a special condition after the date for fulfilment by attempting to assess the contractual intention of the parties. His Honour's primary contention was that the parties clearly expressed their intention that upon non-fulfilment of the special condition, the contract would be at an end. Once it was accepted by the

parties that either party would be able to terminate for non-fulfilment, the only question was whether the right of termination could be defeated by a waiver of the condition after the date. In his view, as there was not authoritative statement to the contrary, once a condition for the benefit of one party has failed, the right of termination conferred on the other party is not defeasible by a subsequent attempt by the first party to waive the condition (at [52]).

Keane JA referred to a number of authorities in support of this view and from which he drew the following conclusions.

- The word 'void' or its equivalent 'cancelled' should be interpreted as voidable at the instance of the party whose default did not cause the failure of the condition: *Suttor v Gundowda*.
- The fact that a condition was for the benefit of one party did not prevent the other party from having a right to terminate for failure of the condition: *Gange v Sullivan* per Barwick CJ and Windeyer J.
- Decisions such as *Perri v Coolanagatta Investments* which suggest that a buyer may waive the benefit of a condition so as to extinguish a seller's right of termination are distinguishable. As time was not of the essence in *Perri*, the seller was required to give a notice to complete to the buyer prior to termination. This would allow the buyer to elect to waive the condition and complete the contract in compliance with the notice. That was not the case where time is of the essence of the condition.
- If the condition is fulfilled prior to one of the parties electing to



terminate, then the right to terminate is lost: *Perri v Coolangatta Investments*.

- The effect of a condition which provides for the contract to be at an end should be distinguished from a contract which makes no provision for the effect of non-fulfilment: *Associated Developers (Aust) Pty Ltd v Allied and General Pty Ltd* [1995] ANZ ConvR 41.
- The fact that a condition is for the exclusive benefit of one party is not determinative of the issue of whether the condition can be waived by that party: *Re Wickham Developments (Australia) Pty Ltd v Feros* [1994] ANZ ConvR 347.
- The rule that where a condition is for the exclusive benefit of one party and may be waived only by that party is only one indication of the intention of the parties to a contract. The

in the event that the condition is not fulfilled, as to whether the purchasers may insist on the contract being completed.

The condition speaks of the contract being 'at an end' in the event of non-fulfilment.

Reasons for granting the appeal

McMurdo J, after referring to the same authorities as Keane J, preferred the view that the buyer was entitled, after the date for fulfilment, to waive the benefit of the clause, thereby disentitling the seller to terminate. His Honour agreed with the majority in the following respects:

- use of the words 'at an end' did not make the clause self executing; and
- either party had the right to terminate the contract if the condition was not fulfilled.

... the crucial consideration in the present case is that the special condition is cast in language which robs the inference that the condition is for the benefit of the purchasers, and so may be waived by them ...

ultimate question remains whether, 'as a matter of construction of the language which the parties have used ..., the terms of the contract support the conclusion that one party should be entitled to enforce the contract contrary to the wishes of the other' (at [52]): *Charles Lodge Pty Ltd v Menahem* [1966] VR 161.

Keane J concludes by stating (at [59]–[60]):

... the crucial consideration in the present case is that the special condition is cast in language which robs the inference that the condition is for the benefit of the purchasers, and so may be waived by them, of significance as an indication of the intention of the parties,

McMurdo J placed significant importance on the rule of construction that the party for whose right the clause is inserted was entitled to waive the condition. In his Honour's view, this rule of construction can affect a departure from the literal meaning of words used, especially where the condition does not expressly deal with the right of waiver. After referring to the decision in *Perri v Coolangatta Investments Pty Ltd*, his Honour noted that if the case before him had merely stated that the condition was required to be fulfilled by settlement, the buyer would have had a right to waive anytime prior to completion subject to the seller's right of termination (at [83]).

Where the condition is required to be fulfilled by a date prior to completion, McMurdo J acknowledged that if such a condition expired before the date for completion, the authorities recognise that the seller as well as the buyer has a right to terminate the contract for non-fulfilment. This is so the seller is not left in a position where there is uncertainty about the future of the contract, but is unable to take any steps to resolve this uncertainty. His Honour was firmly of the view, however, that the right of termination granted to the seller did not change the fact that the clause was for the benefit of the buyer and the buyer retained a right of waiver.

In his Honour's view, the basis for a right of waiver remains just as relevant after the date for fulfilment of the condition as it had been before that date. It remains a condition which is primarily for the purchaser's benefit. Each party has a right to terminate for the non-fulfilment of the condition, but it is apparent that those rights serve different interests. The purchaser's interest is that it might be impossible or too onerous for the purchaser to complete without the benefit of a sale of his or her own property. The non-fulfilment of the condition does not concern the vendor in the same way, because the vendor's ability to complete the contract is entirely unaffected by it. The non-fulfilment of the condition concerns the vendor because it permits the purchaser to avoid, and the vendor's right to terminate is to meet the uncertainty arising from being bound to a contract which the purchaser could at any time avoid. But if the purchaser can waive the condition and become unconditionally bound, the vendor's uncertainty is resolved and the purpose for the vendor's right of termination no longer exists (at [85]).

McMurdo J then drew upon several relevant passages of the judgments in *Perri v Coolanagatta Investments Pty Ltd*, *Gange v Sullivan* and *Willing v Baker* (1992) 58 SASR 357 in support of this view. Interestingly, McMurdo J refers to many of the same passages as

Keane J but draws different conclusions about the meaning and context of those passages.

Comment

The different conclusions of the majority and minority in *Donaldson v Bexton* arise from differing conclusions about the intention of the parties. In the view of the majority, the intention of the parties as evidenced by the agreement was paramount. The insertion of the phrase 'the contract shall be at an end' was key to the conclusion that either party was entitled to terminate the contract and therefore the parties must have intended that this right could not be undermined by a waiver of the condition by one of the parties. This conclusion was reached despite the fact that:

- the clause was obviously for the primary benefit of the buyer; and
- the clause did not expressly limit the right of waiver by either party.

There are two important points to note about the judgment.

First, there is an inconsistency arising from this approach. The majority decision is based upon a finding that both parties had a right to terminate. The authorities relied upon suggest that this leads to the inevitable conclusion that the condition is one for the benefit of both parties (*Charles Lodge Pty Ltd v Menahem* [1966] VR 161; *Gange v Sullivan*). There is no suggestion in these authorities that the benefit of a condition changes after the date for fulfilment has passed. Therefore, if the reasoning of the majority is followed, a further conclusion must be that the buyer would also have been prevented from waiving the condition prior to the time for fulfilment. This was plainly not the intention of the parties.

Second, although Jerrard JA agrees ultimately with the conclusions of Keane JA, his Honour first notes that most of the dicta of the High Court judgments support the view of McMurdo J. However, the reasons for his Honour's ultimate decision appears to arise more from a conclusion that the buyer's actions did not amount to a waiver and, in any event, after the date

for fulfilment passed there 'was nothing to waive' (at [8]).

Impact of the decision

Donaldson v Bexton demonstrates the importance of ensuring that contingent conditions are clearly drafted and include specific reference to both parties' rights of waiver and termination. The use of general terms to describe the effect of a failure of the condition, such as the contract is at an 'end' or 'void' or 'cancelled', may result in the rights of the parties being uncertain and allows greater scope for the court to impose its own view of the parties' intentions.

The decision has already been used by sellers in two subsequent decisions to justify rights of termination under contingent conditions. In *Trupkovic v Furrer* [2007] QSC 027; BC200700613, the contract was subject to the sale of the buyer's property within five months of the date of the contract. The buyer had purported to waive the benefit of the condition and the seller sought to terminate the contract. MacKenzie J, in concluding that the clause was for the benefit of the buyer, distinguished *Donaldson v Bexton* on two bases:

- the buyer had purported to waive the benefit before the date for fulfilment as opposed to after; and
- unlike the condition in *Donaldson*, the condition did not provide for any consequences of non-fulfilment.

In *Bellmere Park Pty Ltd v Benson* [2007] QSC 11; BC200700349, the contract was subject to the buyer undertaking due diligence within 120 days. The clause did not provide for the consequences of non-fulfilment. Again, *Donaldson* was distinguished on the basis of the drafting of the condition.

These decisions demonstrate the difficulty in laying down general principles of interpretation applicable to all situations. The only way a party can be assured of their rights of termination and waiver in respect of contingent conditions is to expressly provide for them in the condition. ●

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Precision required in exercise of options

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Context

There are few more heavily litigated areas of the law than those which concern whether or not an option has been properly exercised. This question was mostly recently addressed by the Supreme Court of NSW in *Express Clearances Pty Ltd v Austral Brick Company Pty Ltd* [2007] NSWSC 213; BC200701521. Young CJ considered whether or not a put option had been duly exercised by a vendor who sent the notice of exercise of option to the purchaser's solicitor via the Document Exchange, rather than to the purchaser directly.

Issues

Young CJ in Equity was asked to decide two separate questions. First, did the vendor give proper notice of the subdivision, registration of the plan and zoning to the purchaser? Second, did the vendor give proper notice of the exercise of the put option?

Clause 9.1 of the agreement provided that:

The Put Option may be exercised by the Vendor or its agent at any time after the Put Option Date and before 4pm Sydney time on the Put Option Expiry Date by delivery to the Purchaser at the same time of:

- (a) a written notice that the Vendor exercises the Put Option; and
- (b) 2 copies of the Contract duly executed by the Vendor and completed as follows ...

Clause 11 of the Option Deed dealt with the issue of giving notices. The first part of the clause provided:

Any notice given under the deed must be in writing addressed to the intended recipient at the address shown in this clause or the address last notified by the intending recipient of the sender.

The clause set out the name, fax number and street address of the

relevant officer of the parties to which notices had to be sent. The other part of the clause provided that a notice given under the Option Deed 'must be signed by that person who was an authorised officer of the sender' and then made provision for the date upon which the notice would be deemed to have been received.

The question was whether or not this clause contained an exclusive method of giving notices under the Option Deed. The purchaser asserted that there was non-compliance with the clause in both instances, as the notices were given to the purchaser's solicitor and not to the purchaser itself.

Analysis

The court considered whether or not the parties, by specifying a particular method of acceptance or notification, had specified the sole method of giving notices permitted by the Option Agreement.

It is trite law that options (either to renew a lease or to purchase property) must be exercised strictly in accordance with the mode specified in the instrument creating the right. Generally, provisions for the service of notices are interpreted as facultative only in the sense that the party giving the notice may use that method of giving notice, but also may use any other method which would be equally efficacious. (*FAI General Insurance Company Ltd v Parras* (2002) 55 NSWLR 498.)

The purchaser contended that the Option Deed was mandatory: creating an exclusive means for the giving of notice and failure to strictly adhere to the method prescribed would render the notice invalid. This required the court to construe the notice provisions in the context of the interpretation provisions of the Option Deed and other clauses which might give some colour to the

intention of the parties in relation to the specific notice provision. For example, in *Young v Lamb* (2001) 10 BPR 18,553, the option agreement did not state whether the definition of 'lessor' included the lessor's agent, nor did it provide an address for service for the lessor. The court there took the view that, given the lack of specificity in the agreement, service on the lessor's agent was comprehended by the agreement. Thus, service upon the lessor's agent which was not expressly contemplated by the agreement was held to be valid.

To a similar end was the decision of *Carter v Schmitt* [2003] NSWSC 1166; BC200307734. In this case, the agreement was also deficient, merely stating that an option to renew could be served upon 'the owner' by notice in writing. The agreement did not contain an address for service and did not define the term 'owner' as also including an

agent of the owner. Notice of exercise of renewal of the agreement, given in writing by letter to the owner's solicitor, was held to be valid exercise — not only because the parties had dealt throughout their agreement through their respective solicitors, but also because the agreement did not expressly exclude service on the owner's solicitor.

The courts have long been sympathetic of the view that, where possible, they will give effect to attempts to perform commercial agreements and only to depart from this principle where it is clear from the construction of the instrument before them that the specified method of exercising an option must be strictly observed.

Result

In the instant case under consideration, Young CJ in Equity distinguished both of the above cases because of the precise terms of the

particular clause in the Option Agreement. Thus, the exercise of the option was invalid because it was not sent to the purchaser's address as provided in the Option Deed.

Conclusion

Cases involving the construction of option agreements are never easy. However, it is as well to acknowledge that there are some cases where a court may depart from what might originally be seen as a strict observance of the exercise provisions in an option agreement. In drafting option agreements, care should be taken by the grantor to ensure that detail, such as the name and address of the person to whom the notice must be given, is explicit in the document. ●

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Trade Practices Act trumps contractual rights

Pamela Jack and Eliza Evans

MINTER ELLISON

Two interesting decisions in NSW have recently confirmed the extent to which contractual arrangements will be overridden by the *Trade Practices Act 1974* (Cth) (the TPA), which in s 52 prohibits corporations, in trade or commerce, from engaging in misleading and deceptive conduct. In both cases, the misleading and deceptive conduct was silence, or a failure to disclose information that was considered to be material.

The Warragamba case

The heavily litigated case of *Abigroup Contractors Pty Ltd v Sydney Catchment Authority* (No 3) [2006] NSWCA 282; BC200608430 was heard in the Court of Appeal (for a second time) in March 2006. The case essentially turned on whether the Sydney

Catchment Authority (the SCA), in failing to reveal certain information to tenderers for the design and construction of an auxiliary spillway at Warragamba Dam, had engaged in misleading and deceptive conduct. The successful tenderer, Abigroup, claimed it had undertaken additional excavation and filling work at substantial extra cost (and its tender was formulated) on the basis of information which was ultimately found to be wrong.

In the contract, the parties agreed that Abigroup took all the risk of site conditions (including latent or hidden conditions), and SCA would not have any liability for any incorrect, misleading or inaccurate information. An express representation in the tender documents stated that 'no plans are available of this embankment or of any

outlet pipe'. Subsequently, it was discovered that SCA had a 1951 plan detailing the site.

Misrepresentation and reliance

Abigroup claimed that had it known of the 1951 plan's existence, it would have detected the incorrect information and either heavily qualified its tender or priced it differently.

The referee's report and the adopting judge held that the additional excavation costs were not recoverable as a matter of contract, and dismissed Abigroup's arguments under s 52 of the TPA.

Ultimately, Abigroup was partly successful with its TPA claim in the Court of Appeal, which held that:

- SCA's representation was misleading and deceptive on its terms, and had been relied upon; and



- the contractual undertakings, representations and warranties provided no protection to the SCA for that representation.

Abigroup was not able, however, to prove its loss because it had calculated the damage based on the specific activity affected (that is, the additional excavation and fill works) and not the loss on the contract as a whole. Abigroup appealed on the basis of the appropriate approach to be taken as to calculation of loss.

The final chapter

In the appeal, the SCA argued that the representation did not alter the relevant position of the parties and, if the representation had not been made, Abigroup would not have had a cause of action and would have to comply with its contractual obligations.

The court confirmed that contravening conduct included express representations and non-disclosure, even where the conduct is innocent. On the question of causation, the appropriate test would be to look at the outcome if the relevant plan had been disclosed, rather than the outcome had the representation not been made.

The court rejected the trial judge's view that there was no evidence of loss. To establish an entitlement to damages, Abigroup had to show that it suffered a loss 'by conduct' which contravenes the TPA. Abigroup was not required to

prove that it had suffered a loss on the whole contract; rather, it was entitled to the discrete loss it had suffered in doing the additional work, subject to proper proof of the loss.

The BAL case:

The case of *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* [2005] NSWSC 20; BC200500999 (see (2005) 20(3) *PLB* 25–26) was decided in February 2005. The Noor Al Houda Islamic College (the school) entered into a 25-year lease of land owned by Bankstown Airport Ltd (BAL) for the purpose of operating a school. Part of the site had been used as a dump site for sanitary can waste (night soil). The proposed lease contained a special condition to test the site for contamination and, if it was contaminated, the material was to be disposed of appropriately. BAL had gone to some pains to provide full and complete disclosure about the risks and issues that could arise on the site, but failed to mention the risk of contamination.

Misrepresentation and reliance

The school argued that had it been aware of the contamination, it would not have entered into the lease or commenced operating on the airport site. BAL said that the school had agreed, under the terms of the lease, to be responsible for all latent conditions on the site.

The court held that when considering misleading conduct by silence, the proper test would be whether there is a reasonable expectation of disclosure. As the school had made it known that it intended to use the site for the sensitive purpose of operating a school, it would have a reasonable expectation of being told of any risk of contamination.

BAL was found to have engaged in misleading and deceptive conduct by failing to advise the school of the site's contamination. BAL's candour in disclosing the potential risks and issues affecting the site increased the misleading effect of its failure to mention the potential risk of contamination. The school was awarded damages for specific past loss, future loss of profits, loss of capital grants, redundancy payments and relocation costs.

What do these cases mean?

The Warragamba and BAL cases demonstrate the following.

- Risk allocation in contract terms will not overcome the effect of any conduct which contravenes the TPA.
- Principals need to take care to diligently search for and disclose all information that they hold that may be material to a contracting party.
- Courts will take a flexible approach to assessing damages under a TPA claim. ●

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