mullins report
MULLINS
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Terminating Contracts **as a Result of Flooding**

MICHAEL KLATT

When the uncertainties of flood levels were facing us, there was no doubt many buyers of homes on low-lying property with contracts yet to settle were left wondering what rights they had, if in fact the home was flooded. Not only would the buyer be faced with the heartache of the damage and stench left behind by flood waters but also the possibility of their investment being worth much less than what they had agreed to pay.

Buyers are offered some relief by s64 of the Property Law Act (QLD) 1974, which provides that a buyer can terminate a contract where the dwelling is damaged or destroyed to the extent that it is unfit for occupation before the date of completion or possession. Minor damage however, would not be sufficient reason to terminate the contract and accordingly it is important for buyers to insure property they are buying from 5pm on the next business day after the contract is signed, which is generally when risk passes to the buyer.

The Supreme Court is currently considering an application by Mrs Maris Dunworth for a declaration that she validly terminated a contract for purchase of a property in the Mirvac Tennyson Reach Apartment Development. Mrs Dunworth has been having a long running dispute with Mirvac having previously sought a declaration from the Court that her contract with Mirvac was void on the basis of misrepresentations allegedly made by Mirvac's agents.

Mrs Dunworth was unsuccessful with that action and was ordered to complete the contract by 8 February 2011.

Unbelievably the Unit that was on the ground floor of the development flooded before settlement could occur. This has given Mrs Dunworth a further opportunity to try and avoid settling the Contract. Mirvac however are opposing the application and seeking an extension of time for settlement.

The matter has been mentioned in Court but will proceed to a trial in relation to the legal and factual issues. The result will certainly be interesting given that sellers usually accept the termination by buyers where significant flooding has occurred. The provisions would similarly apply to dwellings destroyed by earthquakes or fire.

Contents

Employees venting about you on social networking sites – what can you do?

NIGEL INGLIS

Our clients often ask us about what to do when an employee has posted comments of concern on a social networking site such as Facebook. Invariably, the answer depends on what the employee has said in their post.

However, in a recent Fair Work Australia decision, Commissioner Bissett has clarified how these comments may be viewed:

> "Postings on Facebook and the general use of social networking sites by individuals to display their displeasure with their employer or a co-worker are becoming more common. What might previously have been a grumble about their employer over a coffee or drinks with friends has turned into a posting on a website that, in some cases, may be seen by an unlimited number of people. Posting comments about an employer on a website (Facebook) that can be seen by an uncontrollable number of people is no longer a private matter but a public comment."

This is the case whether the comment is posted during work or outside of work:

> "A Facebook posting, while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see…It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences."

It is important to ensure that employers have a policy about the use of social networking sites that discusses the employer's expectations and standards of what is acceptable and what is not acceptable content for posting on social networking sites. The policy should also clearly state the employer may monitor employees' use of social networking sites.

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Employers who do not educate their employees about the expected standards, or advise them that they may monitor social networking sites, may find it difficult to take disciplinary action if they become aware of comments on such sites that concern them.

We can assist with the preparation of such a policy, as well as advise you about how to handle an employee you discover has posted inappropriate comments on any social networking sites.

Changes to Consumer Laws

ANDREW NICHOLSON

The majority of businesses will be affected as a result of recent changes to the Federal Consumer Laws. Those businesses will have to review their procedures and more importantly their documents to ensure that they are complying with the new requirements.

The changes to the law go further than the introduction of a new name for the legislation (with the *Trade Practices Act* having been replaced by the *Competition and Consumer Act*).

Snapshot of changes

The onus is now on businesses to ensure that their consumer contracts or terms and conditions:

- Do not provide unfair terms – the Act now provides that unfair (more than just favourable or one-sided) terms cannot be incorporated into standard forms of consumer contract;
- Address the new warranty/guarantee requirements imposed on sellers, which replace the implied conditions and warranties previously incorporated into agreements under the Trade Practices Act;
- Address misrepresentations to consumers including the displaying of "no refund" and "no responsibility" signs, which are contrary to the Act;
- Require mandatory reporting of product safety information, particularly where death or serious injury has been caused by a consumer product;

- Guarantee consumer provisions – the changes have imposed a number of additional requirements that cannot be excluded. In particular, goods must perform as intended for a reasonable period and the consumer has recourse against either the supplier or the manufacturer if that does not occur. Businesses should carefully review their warranty provisions as the "up selling" of extended warranties and claims about consumers rights under guarantees have been altered by the changes to the Act. Asking consumers to pay for an additional warranty or guarantee where they already have those rights (under the new Act) will amount to a breach.

There are enhanced regulatory powers under the Act and the ACCC and the Department of Fair Trading will now work together as enforcement bodies.

How to prepare

Businesses must ensure that their staff are properly trained and familiar with the new requirements. A review of existing agreements and other materials, (including any warranties, product information or guarantees, advertising and marketing material, disclosure documents and compliance procedures or manuals), should be undertaken to ensure compliance.

No doubt the ACCC will be keeping a keen eye on the enforcement of the new provisions, in the short term.

Drink Driving – Patrons Beware

CURT SCHATZ

Over the last couple of years, liquor law has been the subject of considerable amendment and increasing regulation. You may recall the significant reforms that came into effect 1 January 2009, which saw the restructure of the Queensland liquor licensing regime.

The Queensland Government is now toughening its position on drink driving, with new initiatives having recently taken effect on 6 December 2010 and other initiatives due to take effect mid 2011. To this end it is pleasing to see the Government initiatives taking a new direction, holding individuals accountable for their own actions and safety as opposed to increasing the responsibility of licensees.

Alcohol Ignition Interlocks

From 6 December 2010 alcohol ignition interlocks must be fitted in the vehicles of high-risk drink driving offenders for a minimum period of one year.

An alcohol ignition interlock is a breath-testing device connected to the ignition of a vehicle. In order to start the vehicle the driver must have a Blood Alcohol Concentration of zero, or else the interlock will register a "fail" and lock.

Drink drivers will be subject to the interlock program if they have committed and been convicted of any of the following offences on or after 6 August 2010 and served out their disqualification period:

1. First time offenders recording a Blood Alcohol Concentration of 0.15 or more;
2. Dangerous driving while affected by alcohol;
3. Two or more drink driving offences within five years; and/or
4. Failing to provide a breath/blood specimen.

Major Reforms to Take Effect Mid 2011

The three major drink driving initiatives to take effect mid 2011, aimed at strengthening penalties and making it easier for police to prosecute offenders are:

1. Police will be authorised to immediately suspend drivers with a Blood Alcohol Concentration of 0.10, a reduction from the current limit of 0.15;
2. Increasing the time limit for officers to obtain evidentiary secondary blood/breath specimen for drink driving offences from two hours to three hours; and
3. An arresting/detaining officer will be empowered to conduct the breath analysis for drink driving offenders without the presence of a second officer as is presently required.

Licensees will likely have some exposure to patrons subject to the interlock program in the future. In any case, it is pleasing to see the Government directing their efforts to increasing individuals' responsibility for their actions and safety, in preference to increasing the responsibility of licensees.

Suing the Council for Flood Damage

CHRIS HARGREAVES

The personal and financial cost of the floods in January 2011 will be largely incalculable for the majority of affected people. As insurance company decisions are finalised, hydrologist reports are scrutinised, and affected residences and businesses through the State take stock of their situation, a common question will be asked: who can I sue?

To date in the media and public opinion pages there has been a number of contributing authors suggesting that one likely candidate to be on the receiving end of a large-scale class action will be a number of local councils.

The most common investigation undertaken will be to examine the records provided to residents by way of flood report searches when purchasing their properties.

A council will provide what information it has in relation to these kinds of risks, generally together with a fairly pointed disclaimer as to the losses it will not be responsible for by the reliance upon the information. The information is based on the Q100 which, according to some, was demonstrably inaccurate when the floods hit.

In any likely claim that would be brought against a council it will need to be demonstrated that the recipient relied upon the information. In some cases, it will need to be demonstrated that the recipient was induced to act in a particular way as a result of the receipt of that information. Combined with the disclaimer that accompanies the information, together with the rare occurrence by which (prior to January 2011) individuals made decisions about land purchases based on flood data, it will be difficult in all but the most clear evidentiary circumstances to establish those elements. In addition, the standard contract for the purchase of land does not provide a right of termination in the event that you are dissatisfied with the flood data provided.

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Councils will also assert that they cannot be held responsible for what is primarily an act of God. That argument has some merit.

In essence, whilst claims against local councils have been floated in public forums, it will be extremely difficult for residences or businesses to establish the necessary facts and legal requirements to succeed in such a claim, in all but the most clear and unique circumstances.

Unit Owners Pay For Flood Repairs

REBECCA CASTLEY

The recovery from the Brisbane floods in January this year continues. For those who were directly affected, this will unfortunately be the case for some months. The event has also highlighted what is potentially a complex issue for bodies corporate.

The impact on owners of units or townhouses within schemes that have suffered flood damage is potentially significant. Given the massive increase in strata-title living since the 1974 flood, this is the first time the issue has been experienced on this scale.

A body corporate is obliged to insure for the full replacement value of common property and body corporate assets. That policy must cover "to the greatest practicable extent" damage and cost for reinstatement and replacement.

What has now come to light is that some body corporates did not have cover for flood. In some cases, this may be because insurers were not prepared to offer cover at reasonable rates. The owners of units or townhouses in schemes affected are potentially facing large special levies to repair the damage.

By law, an annual general meeting notice must include details about the insurance policies, which is then endorsed by members as part of the meeting process. It is important as an owner to be aware of the cover taken out by the body corporate, including the terms and exclusions. If an owner is not satisfied that appropriate insurance is in place, there are options that may be available, depending on the circumstances. This could ultimately result in an application to the Tribunal for resolution.

There is still, of course, much uncertainty whilst the Royal Commission with respect to the floods is completed and the full ramifications to the insurance industry become clearer. However, it is foreseeable that some aggrieved owners may wish to pursue claims against those parties who may arguably be at fault.

For all those involved in body corporate schemes, from developers, body corporate managers, committees and owners, the recent events are a reminder of the body corporate's insurance obligations and the need to put in place appropriate processes to ensure that policies are appropriately reviewed and renewed.

The proposed model Work Health and Safety Act is very close to becoming law and introduces a raft of changes very different to the current laws, in particular for executives. In our next edition of Report we will discuss the proposed changes and provide some very useful tips for how to ensure compliance when the laws commence, which is proposed for on 1 January 2012.

JOHN MULLINS
EDITORIAL

We generally look forward to a new year with a sense of renewed energy and enthusiasm. That enthusiasm has taken a major beating over the last month or two and unfortunately the people in North Queensland continue to receive a beating.

The events in Queensland and Christchurch have been quite shocking. Just as I am writing this we are confronted by the shocking news in Japan.

The firm has its roots in Tully, which is where my father set up his first small office as a solicitor adjoining the Hotel Tully, which had been owned and operated by his parents.

People in North Queensland are made of tough stuff, which is a good thing because they are given many challenges to endure and the latest one, which is ongoing, has been severe.

The floods in Brisbane caused the closing of our firm for 8 ½ days, which was extraordinarily disruptive, and we are very appreciative to our staff, our clients and other Brisbane firms for their cooperation, support, sacrifice and patience during this period. Thankfully while we were out of the building our office premises itself was unaffected, and accordingly, once back in the office we were able to get back up to speed very quickly.

We would like to again thank the Partners of MacGillivrays for helping us out during this difficult time. Their generosity of spirit is greatly appreciated by us.

Many people have suffered greatly and we express our sympathy to those who have lost loved ones, houses, jobs and possessions.

As you might expect, there are a number of articles in this newsletter that relate to matters arising out of the floods. There were some consequences that occured from the floods for groups such as Body Corporates that would not have been anticipated.

Issues of insurance and insurability and emergency planning will, with recent experiences, become more significant and important than they have ever been. As always if you need any legal help with any of this we are happy to be of assistance, or if you just want to have a chat about it we are also available and happy to do so.

mullins LAWYERS

Level 21, Riverside Centre
123 Eagle Street
Brisbane Qld 4000

GPO Box 2026
Brisbane Qld 4001

Telephone 07 3224 0222
Facsimile 07 3224 0333
email: jmullins@mullinslaw.com.au
www.mullinslaw.com.au