

# ALERT

16 SEPTEMBER 2010

## Case Note: Bovino Pty Ltd v The Casey Group Holdings Pty Ltd [2010] VSC 391

### Overview

On 10 September 2010, the Supreme Court of Victoria handed down its decision in *Bovino Pty Ltd v The Casey Group Holdings Pty Ltd* [2010] VSC 391.

The decision confirmed that, in circumstances where:

- a real estate agent has advised the purchaser of property that there were other prospective purchasers who were prepared to make an unconditional offer or a higher offer, despite there being no such prospective purchasers in existence; and
- the purchaser relied on the representation to enter into a contract without conditions precedent (which it would otherwise have required),

the purchaser may rely on the misleading and deceptive conduct provisions under s52 of the *Trade Practices Act 1974* (TPA) to avoid the contract, where the purchaser has reason to take as truth the real estate agent's statements.

### FACTS

1. The Casey Group Holdings Pty Ltd (**the Casey Group**) and Bovino Pty Ltd (**Bovino**) had been in negotiations for Bovino to sell to the Casey Group a parcel of land (**property**). Negotiations were conducted between Mr Lewis, the agent, and Mr Mitchell, general manager of property for the Casey Group. The two men had known each other for many years and were friends.
2. Initially, the Casey Group required a condition precedent that gave the Casey Group the right to withdraw from the contract if it failed to obtain a planning permit for its proposed development within a stipulated time after the date of the contract.
3. During the course of negotiation, Mr Lewis left Mr Mitchell a voicemail message, the substance of which was:
  - (a) Your current offer is unacceptable.
  - (b) There is another purchaser willing to enter into an



unconditional contract.

(c) Unless you make an improved and unconditional offer by 5pm this afternoon, you will lose the opportunity to another purchaser.

4. In fact, there was no other unconditional offer available to Bovino.
5. Later that day, the Casey Group made an unconditional offer to Bovino, and subsequently entered into a contract on the terms of the offer, which it would not otherwise have done.

## CLAIM

The Casey Group alleged that an oral representation by Bovino to the Casey Group, through Bovino's estate agent, Andrew Lewis, was a contravention by Bovino of s52 of the TPA, as the basis for relief under s87.

## FINDINGS

The court noted that the effect or likely effect of the oral representation must be analysed in context, which was:

- "A statement made by a real estate agent to a property developer, following a written offer and counter-offer."
- "A statement made by the agent to a long-time acquaintance and friend." The court noted that, in evidence, "Mr Casey accepted that if a real estate agent told him another purchaser was interested in a property he would not, in every case, believe this as a literal truth. He said, however, that there was a difference on this occasion. He had been told by Mr Mitchell that Mr Lewis was a friend and could be trusted."

- Particular events followed the representation; that is, the response of the Casey Group in making an unconditional offer.

The statement made by Mr Lewis was found to be misleading or deceptive for the following reasons:

- "The statement was false and was intended to and did convey to the Casey Group the threat that another purchaser was willing to enter into an unconditional contract, at a price equal to or better than the counter-offer, and if a satisfactory offer was not made by the Casey Group by 5pm that day, the property would be sold to the other purchaser. In fact, no other purchaser was then willing to enter into such a contract. Therefore the property was not at risk of being sold to another purchaser if the Casey Group did not make an unconditional offer by 5pm that day."
- The statement was intended by Mr Lewis to put pressure on Mr Mitchell, and in turn the Casey Group, to remove their requirement for the condition precedent. The Casey Group then removed this requirement, in reliance on the statement.

## RESULT

Following the finding of misleading and deceptive conduct, the court made a declaration that the contract of sale made between Bovino and the Casey Group and the guarantee and indemnity given by Mr Casey were void *ab initio*.

Accordingly, the court ordered that Bovino refund to the Casey Group the deposit and the extension fee, together with interest since the date of payment.

## COMMENT

Purchasers, vendors and real estate agents alike should be aware of this decision and the possibility that contracts of sale may be void in similar circumstances.

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