

# ALERT

7 NOVEMBER 2012

## *Foster v Hall* [2012] NSWCA 122 – The obligation to use ‘best reasonable endeavours’ to register a plan of subdivision

*Foster v Hall* [2012] NSWCA 122 (**Foster**) is an example of the liberal judicial interpretation of contractual terms that require parties to the sale of real property to use their ‘best endeavours’ in connection with the registration of a plan of subdivision. Foster offers guidance on the meaning of the term ‘best reasonable endeavours’, which is an amalgam of clauses that require parties to use their ‘best endeavours’ and those that require parties to exercise ‘reasonable endeavours’. The decision in Foster is consistent with the content of a prior Cornwall Stodart Alert regarding the Victorian Supreme Court of Appeal decision in *Joseph Street Pty Ltd v Tan* [2012] VSCA 113, which was posted on 12 September 2012.

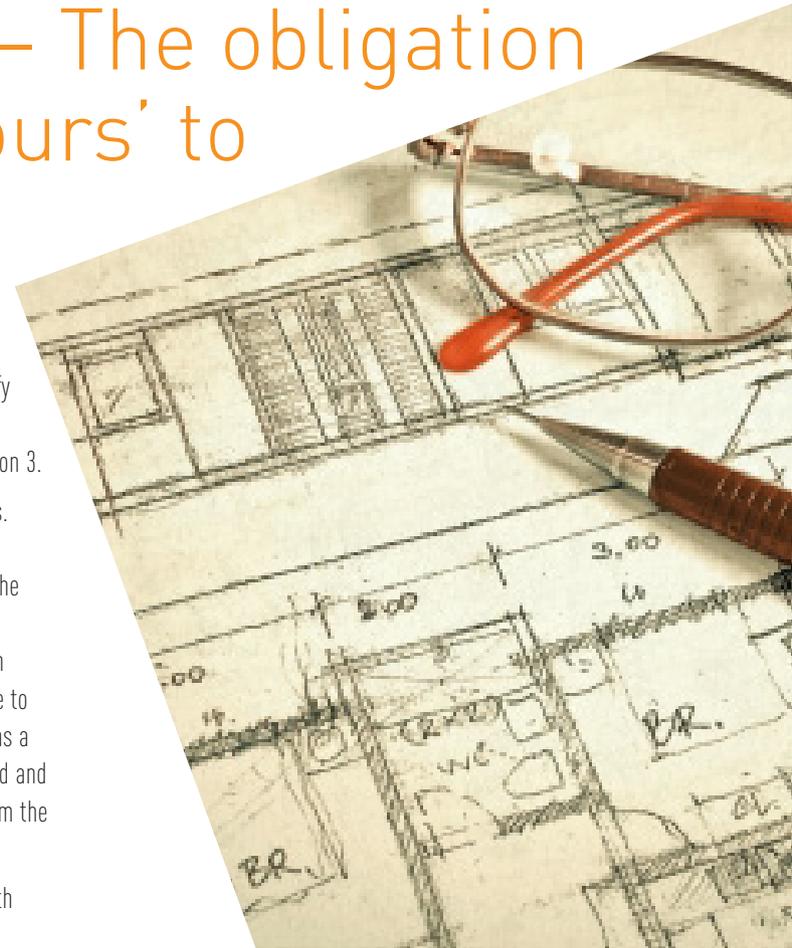
### The facts

On 17 October 2000, Mr and Mrs Hall (**Purchasers**) entered into a contract for sale of part of rural land that included a dwelling located at the top of a steep ridge (**Property**). The contract was conditional upon the registration of a plan of subdivision within 12

months of the date of the contract (**Special Condition 3**). Special Condition 4 of the contract provided that the parties were required to use their ‘best reasonable endeavours to satisfy Special Condition 3’. Both parties were entitled to rescind the contract by written notice failing satisfaction of Special Condition 3.

The Property was located in an area that was prone to bushfires. Wollongong Council (**Council**) issued its ‘development consent’ to the proposed subdivision on conditions which included that the developer build an ‘all-weather access for a fire appliance’. The vendors were unable to construct the access in accordance with the Council’s specifications (eg 9 metre width, 1:6 gradient) due to the topography of the land. The development consent (which was a prerequisite to the registration of the plan of subdivision) lapsed and the plan of subdivision was not registered within 12 months from the date of the contract.

The vendors purported to rescind the contract in accordance with



Special Condition 4. The Purchasers disputed the validity of the rescission and terminated the contract on the basis that the vendors' conduct constituted repudiation of the contract. On 15 April 2011, Justice Tamberlin found the Purchasers had validly terminated the contract and made an order for damages in excess of \$1.5 million. The vendors appealed the decision.

## The appeal decision

Justice Macfarlan (with whom Justices Meagher and Tobias agreed) held that the meaning of the term 'best reasonable endeavours' equated with the meaning of 'best endeavours' in this instance. His Honour stated at [33]:

*"[t]he addition of the word "best" to the expression "reasonable endeavours" raises the required standard to a level somewhat higher than that imposed by a simple "reasonable endeavours" obligation. However, I do not consider that there is any significant difference, at least for present purposes, between the content of an obligation to use "best reasonable endeavours" and one to use "best endeavours".*

His Honour cited High Court authority for the proposition that a party's obligation to use its 'best endeavours' is usually 'governed by what is reasonable in the circumstances'.<sup>1</sup> Therefore, the inclusion of the word 'reasonable' to Special Condition 3 did not alter the substance of the 'best endeavours' obligation on this occasion.

The vendors maintained they had used their best endeavours in an

<sup>1</sup> *Hospital Products Ltd v United States Surgical Corporation* [1984] 156 CLR 41, 91-92

attempt to comply with the conditions of the development consent and therefore to register the plan of subdivision. The court rejected the submission in consideration of the following circumstances:

- the Council expressly informed the vendors that they could seek to amend the conditions of the development consent to account for a change to the specifications of the fire access;
- the Council had amended the conditions of the development consent on a previous occasion and therefore demonstrated a willingness to consider a further amendment; and
- the vendors did not apply to the Council to amend the specifications of the fire access to enable compliance with the conditions of the development consent.

The court concluded that the vendors had not exercised their 'best reasonable endeavours' to register the plan of subdivision and dismissed the appeal with costs.

## Implications

- A contractual obligation to use 'best reasonable endeavours' may, in practice, equate to an obligation to use 'best endeavours'.
- Developers and vendors who assume an obligation to use their best reasonable endeavours should make a bona fide attempt to renegotiate a condition (satisfaction of which is a pre-requisite to registering a plan of subdivision) that requires a developer or vendor to do an act (or refrain from doing an act) that is unfeasible in the circumstances.
- The decision suggests that a voluntarily assumed obligation to use 'best endeavours' may require a party to adopt a

rigorous, problem-solving approach to overcome unforeseen barriers to the registration of a plan of subdivision.

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