NEWSLETTER

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Commercial Litigation Newsletter

Welcome

This quarter we have included news on:

- *Cityrose Trading Pty Ltd v Booth* and the importance of drafting contracts carefully
- dispute resolution clauses and when these are enforceable
- *ACCC v Lux* and unconscionable conduct under the Australian Consumer Law
- the issues surrounding advertising mortgagee sales.

Please do not hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.

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Case note – *Cityrose Trading Pty Ltd v Booth*

Background

Poorly drafted contractual terms can cause major problems for the parties to a contract. The recent decision of *Cityrose Trading Pty Ltd v Booth*[1] serves as a reminder of the costly consequences that may result from the inclusion of ill-considered words in a contract.

The decision

The case concerned a dispute as to whether the purchaser under a contract for the sale of land was required to pay GST in addition to the stated purchase price or whether that price was inclusive of GST.

In the Particulars of Sale, the purchase price was stated to be $2.25 million but did not stipulate whether this figure was inclusive or exclusive of GST. The contract included a clause with respect to GST (Special Condition 7), which was in the following terms:

> **7. Goods and Services Tax**
>
> For the purposes of this special condition:
>
> (a) 'GST' means GST within the meaning of the *GST Act*;
>
> (b) '*GST Act*' means A New Tax System (Goods and Services) Act 1999;
>
> (c) Expressions used in this special condition which are defined in the *GST Act* have the same meaning as given to them in the *GST Act*.
>
> 7.2 The consideration payable for any taxable supply made under this contract represents the value of the taxable supply for which payment is to be made.
>
> Where a taxable supply is made under this contract for consideration which represents its value, then the party liable to pay for the taxable supply must also pay at the same time and in the same manner as the value is otherwise payable the amount of any GST payable in respect of the taxable supply.

The difficulty arose because 'value' and 'consideration' are separately defined terms under the GST Act, but Special Condition 7 deemed them as equivalent. Justice Emerton held that this clause was 'so obscure and incapable of any definite or precise meaning that the Court [was] unable to attribute to the parties any particular contractual intention'. Accordingly, her Honour made a declaration that the clause was void for uncertainty and severed it from the contract. The purchaser was therefore entitled to a refund of $225,000 (which it had paid under protest in order to ensure settlement went ahead).

Comment

It is critical that parties entering into a contract ensure that all terms are carefully and consistently drafted, particularly key terms such as pricing provisions. The nature of language is such that there will always be some ambiguity in a contract; however, careful drafting can minimise the chances of a dispute arising and prevent costly litigation.

If you are considering entering into a contact, please contact us for advice – we can ensure that its terms meet your needs and best protect your interests.

Authored by: Lachlan Currie and Leneen Forde, Cornwall Stodart

[1] [2013] VSC 504

Is your dispute resolution clause enforceable?

What is the purpose of having a dispute resolution clause in a contract?

Dispute resolution clauses in contracts are a mechanism to enable the parties to resolve a dispute efficiently and at the earliest opportunity, to hopefully avoid expensive and lengthy court proceedings and for a business to avoid being bogged down in litigation where the issues can become complicated and voluminous.

What happens if a party to a contract ignores the dispute resolution clause?

The failure of a party who commenced court action without properly addressing a legally enforceable dispute resolution clause may result in the proceedings being stayed or adjourned until the process or procedure outlined in the particular clause is completed.

What makes a dispute resolution clause unenforceable?

The recent case of *WTE Co-Generation & anor v RCR Energy Pty Ltd & anor* [2013] VSC 314 is a timely reminder of the court's approach when considering a dispute resolution clause that has not been complied with by the parties to a contract.

In this case the defendants sought a stay of the proceeding until the parties complied with a contractual dispute resolution clause.

Sub-clause 42.2 was particularly contentious and read as follows:

> **42.2 Conference**
>
> Within 7 days after receiving a notice of dispute, the parties shall confer at least in the presence of the Superintendent. **In the event the parties have not resolved the dispute then within a further 7 days a senior executive representing each of the parties must meet to attempt to resolve the dispute or to agree on methods of doing so** [emphasis added]. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.
>
> If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute may be referred to litigation.

The issue between the parties related to sub-clause 42.2 wherein it states that a senior executive of the parties must meet to attempt to resolve the dispute or agree on methods of doing so. The defendants said that clause 42 had not been complied with. The plaintiffs said that the clause was uncertain and unenforceable.

The court's approach to contractual uncertainty generally is aptly summarised by Habersberger AJA in *Robertson v Unique Lifestyle Investments Pty Ltd* [2007] VSCA 29 when he stated: 'the modern approach to the construction of commercial agreements of business people is, generally, to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement'.

In the present case the court found that the sub-clause was unenforceable. It also found that the process contained in the sub-clause was uncertain and required the parties to do one of two things and no process was outlined to determine which option the parties should pursue.

The court found that there was no described method of resolving the dispute and that it may depend on the further agreement by the parties as to the method to be employed in resolving the dispute.

What should a contractual dispute resolution clause contain?

It is important for your business to be aware of the dispute resolution clauses contained in contracts that have been entered into and whether in fact the clause is sufficiently certain to be able to be carried out by the parties.

Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 cited the following minimum requirements for a mediation or dispute resolution clause to be enforceable, as current Australian case law:

- it should operate to make the completion of the mediation a condition precedent to the commencement of court proceedings;
- there cannot be stages in the process where agreement is needed on a course of action before the process can proceed;
- the administrative process for selecting and remunerating a mediator ought to be included in the clause, or the ability for a third party to make the selection;
- the clause should set in detail the process of mediation to be followed.

Authored by: Jenny Gearing, Cornwall Stodart

Full Federal Court clarifies unconscionable conduct under the Australian Consumer Law: *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90

The recent decision of the Full Federal Court in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 involved an appeal by the Australian Competition and Consumer Commission (**ACCC**) against the dismissal of proceedings against the respondent, Lux Distributors Pty Ltd (**Lux**), regarding unconscionable conduct arising from the sale of vacuum cleaners by direct salesmen to three elderly women in their own homes.

On appeal, the Full Federal Court (Chief Justice Allsop, Justice Gordon and Justice Jacobson) set aside the judgment of Justice Jessup and made declarations that Lux had in fact engaged in unconscionable conduct.

Key facts

The ACCC alleged that between 2009 and 2011, Lux engaged in unconscionable conduct regarding the sale of vacuum cleaners to elderly consumers. The unconscionable conduct provisions are found in s 21 of the ACL, and its predecessor s 51AB of the *Trade Practices Act 1974* (Cth) (**TPA**), which provides that 'a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to another person, engage in conduct that is, in all the circumstances, unconscionable'.

The case at first instance was brought in respect of five elderly women. The Lux sales representatives made telephone calls to each of the women offering a free vacuum cleaner maintenance check. The primary purpose of the home visits by the Lux representatives was to sell a Lux vacuum cleaner; however, this was not disclosed to the consumers in the telephone calls nor by the representatives who conducted the checks.

The ACCC alleged that, following the cursory maintenance check, each of the women was then subjected to unfair and pressuring sales tactics to induce them into purchasing a vacuum cleaner for a price of up to $2,080.

At first instance, Justice Jessup held that the conduct of the Lux representatives was not unconscionable because, despite their age, the consumers were lucid and able to make their own judgments about the offers made by the Lux representatives, and the contracts that the alleged victims entered into contained a notice near the signature space advising of a cooling-off period.

The appeal

The appeal to the Full Federal Court related to three of the consumers, who were aged 82, 89 and 93 years old respectively.

The ACCC's central submission on appeal was that the primary judge erred in law by finding that a company in the position of Lux may, in trade and commerce, act conscionably by dealing with consumers in the following manner:

- obtaining entry to homes of consumers by deception;
- obtaining and maintaining entry into the homes of consumers by contravention of statutory provisions directed to the selling techniques, the entry into the home, the remaining in the home, and the fairness of the transaction;
- thereby depriving the consumer of the opportunity to deny entry to the sales person on the true basis for the visit;
- exploiting the position it has deceptively obtained by transforming the home visit from a stated purpose to the true purpose of making a sale;
- as long as the consumer is given a one-week cooling-off period in the contract, at [73].

The Court of Appeal agreed that this conduct was unconscionable, stating: 'Laws of the States (and the ACL) reinforce recognised societal values and expectations that consumers faced with direct salespersons will be dealt with honestly, fairly and without deception or unfair pressure' at [5].

The Court of Appeal stated that there were, with respect, errors in his Honour's approach as follows:

- Little weight was given to the fact that the salesmen gained entry to the homes by deception: 'norms and standards of today require businesses who wish to gain access to the homes of people for extended selling opportunities to exhibit honesty and openness in what they are doing, not to apply deceptive ruses to gain entry' at [63].
- The maintenance, demonstration and sale process and the length of time the salesmen spent in the homes, was not disadvantageous but was advantageous to the salesmen because a 'subtle inequality of bargaining power is gained by the representative through the householder being unwilling to ask the person to leave, especially as he is being so "helpful"' at [64].

- While the salesman may have intended and did complete the maintenance check, 'the primary purpose of each representative was to sell a vacuum cleaner, not to carry out a free maintenance check. The initial deception, the ruse, was critical to the creation of the opportunity to sell and was the launching pad for all that followed. This deception tainted all the conduct thereafter' at [65].
- The primary judge failed to give weight to the 'effect of the deception that unfairly deprived each of the women of a meaningful opportunity to decline to have the representative enter her home' at [66].
- The primary judge 'wrongly assessed the relative bargaining strengths of the parties' given the salesmen entered and remained in the homes for an extended period of time: at [67].

- The primary judge failed to give weight to the contravention of legislative provisions: 'the vulnerability of people to pressure by skilled sales persons who gain entry into their homes is sought to be regulated in furtherance of fairness and the elimination of aspects of vulnerability. In assessing the conscionability or not of a particular instance of such selling, the compliance with public regulations will be centrally important' at [71].
- The primary judge gave too much weight to the statutory cooling-off periods in the contracts: 'one does not look to the conduct that was earlier practised (entry by deception, contravention of relevant legislation, and lengthy sales techniques leading to people feeling prevailed upon to buy), and reduce or ameliorate its character as unconscionable because, if the householder knows of it, she or he can get out of the contract' at [72].

The practices of the Lux representatives were considered to be unsolicited consumer agreements under section 69(1) of the ACL. The ACL defines unsolicited consumer agreements as agreements for the supply of goods to a consumer that are made as a result of negotiations between a dealer and consumer at a place other than the business or trade premises of the supplier of the goods, in circumstances where the consumer did not invite the dealer to come to that place for the purposes of entering into such negotiations.

In addition to the unconscionable conduct provisions and unsolicited consumer agreements, it was found that Mr Manga contravened obligations under the *Fair Trading Act 1999* (Vic) by:

- failing to inform Mrs May that he was required to leave immediately if she asked him to do so, and to inform her that he required her written consent to stay for more than an hour before commencing negotiations (s 62E);
- (given Mr Manga was not permitted to remain on the premises for more than an hour without written consent being made before an hour had expired (s 62B)), failing to leave her home after an hour, since he did not have that written consent (s 62C).

These provisions have since been repealed.

Further, Mr Farquhar contravened s 74 of the ACL by failing to tell Mrs Baird that his purpose was to seek to sell her a vacuum cleaner and that he was obliged to leave her home on request.

Conclusion

With new provisions in the ACL, businesses and consumers will be looking to the ACCC to establish the extent of those provisions. Businesses need to ensure that their sales practices are not breaching the ACL. Being unaware of provisions or following standard industry practices is no defence to unconscionable conduct, nor will the ability to get out of a contract through statutory cooling-off periods in the contract lessen the conduct. It is clear from the judgment that the test of whether conduct is unconscionable will be based on the norms and standards of today, rather than the previous interpretation of moral judgment.

As the Court of Appeal held:

> 'Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of

> society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty' at [41].

Authored by: Jacinta Atkinson and Leneen Forde, Cornwall Stodart

Advertising mortgagee sales

Background

The current economic climate has seen a rise in the number of mortgagee sales. There appears to be a corresponding increase in litigation surrounding mortgagee sales.

Mortgagees who take possession of a security property are under a common law duty to '**act in good faith**' regarding its sale,

and the duty of a mortgagee to obtain the best price possible of itself requires that the sale of the security property is properly advertised.

One of the most common forms of complaint or challenge made regarding mortgagee sales relates to the advertising of the sale. This can largely be attributed to the fact that prior to a mortgagee sale, advertising is the most visible conduct of a mortgagee that a mortgagor can seek to challenge.

Numerous cases exist where mortgagees have been found liable to pay damages because the advertising has been found to be deficient.

Recent decision

In a recent decision dated 12 August 2013 (***Commonwealth Bank of Australia v Geoffrey Anthony Shannon*** 2013 NSWSC 1076), the Supreme Court of New South Wales was asked to consider, among a number of issues, whether the receivers appointed on behalf of the lender had taken all reasonable care to sell the security property for not less than its market value. The security property was a property development site.

The case is helpful to mortgagees because it offers an examination of the standard of care imposed under s 420A of the Corporations Act, which provides:

> In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
>
> (a) if, when it is sold, it has a market value – not less than that market value; or
>
> (b) otherwise – the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.

More importantly, the decision deals in particular with the question of whether there was a breach of the mortgagee's duty by virtue of the fact that the sale had been advertised as a '**mortgagee sale**'.

The judge cited a number of authorities and said that the 'suggestion that advertising a property as a mortgagee sale would necessarily depress the price is by no means a logical proposition. Indeed, it might equally be said that it could increase the price… '

The judge went on to say: 'In my view, much will depend on the type of property being sold and the way in which the words "mortgagee sale" are used in the advertising campaign. For example, to emblazon the words in heavy black type prominently across advertising brochures may give the impression that the mortgagee is conducting a "fire sale" rather than seeking the best price reasonably obtainable in the market. Such an impression might cause buyers to hang back from making their best offers. On the other hand, where the property is advertised attractively, with its best features given appropriate prominence, the information that the sale is by a mortgagee may serve merely to whet the appetite of the person seeking that type of property.'

In his reasoning, Sackar J made reference to the commercial reality and he noted that in some instances advertising a security property as a 'mortgagee sale' can attract larger numbers of interested purchasers hoping for a bargain, which in effect would give rise to a larger and stronger demand for the property being sold.

In the Shannon case, the judge was of the opinion that the lender had engaged appropriate professionals who had properly considered the marketing campaign and reached agreement that advertising the property as a 'mortgagee sale' was in fact the best way to maximise the price.

The judge also acknowledged the fact that it would become apparent to any prospective buyer that the lender was the vendor as mortgagee in possession, once they had inspected the contract of sale.

Comment

An examination of case authority in this area of law demonstrates that whether or not sufficient advertising has been conducted by the mortgagee will depend on the circumstances in each case, the type of property and the normal advertising practices for the locality in which the property is situated.

Some good guidance is provided by the Australian courts as to the test that would be applied by a court in determining whether the advertising of a mortgagee sale was sufficient. In the High Court decision of ***Commercial & General Acceptance Limited v Nixon*** (1981) 38 ALR, his Honour Chief Justice Gibbs held that:

'A reasonable man, selling his own property by auction, and wishing to obtain the market value, would not allow the auctioneers a free hand to advertise in whatever manner they thought fit; he would make reasonable endeavours to ensure that the advertising proposed was adequate. It is not unduly burdensome to require a mortgagee to exercise similar care.'

A practical and useful guide for lenders is contained in Bulletin number 38 published by the Banking Ombudsman, which discusses aspects of mortgagee sales including advertising and sets out some of the questions the Ombudsman considers when investigating a dispute about a mortgagee sale.

The following is an extract from the above Bulletin, which makes reference to some of the considerations regarding the sale process and the extent of advertising, which will be taken into account by the Ombudsman when investigating a complaint about the conduct of a mortgagee sale, and provides a useful list of items to be considered by lenders when exercising their power of sale.

The sale process

Preparations for the sale

7. Did the financial services provider obtain at least one sworn valuation, preferably from an external valuer?
8. Did the financial services provider obtain at least one market appraisal from a real estate agent, which includes matters such as a suggested market value, recommendations for the conduct of the sale of the property, a marketing program, recommendations for advertising, details of any work required to prepare the property for sale and any potential problems with the sale or marketing of the property;
9. Did the financial services provider appoint an agent and provide detailed instructions as to the conduct of the sale? During the sale period did the financial services provider review the agent's handling of the sale and provide further instructions if required?

Extent of advertising

10. Did the financial services provider ensure that the advertising was sufficient in the circumstances, taking into account the marketing proposal, the usual forms of advertising for the property and in the locality and any expert advice?
11. Did the financial services provider approve the proposed advertising?

Conclusion

The recent decision of *CBA v Shannon* demonstrates that the courts will take into account commercial considerations. The decision should help to dispel the view held by some that lenders should never advertise a property as a 'mortgagee sale'.

However, lenders need to understand the importance of a properly considered and adequate advertising campaign and remain vigilant in their monitoring of the advertising conducted by their agents because they ultimately remain liable.

Authored by: Gino Potenza, Cornwall Stodart

Cornwalls' Commercial Litigation Team Member Profile

Stephen Sawer, Partner, Commercial Litigation

Stephen is the newest Partner in our Commercial Litigation team, having recently joined the partnership. He has over 30 years' experience in commercial and corporate litigation, with a focus on reconstruction and insolvency. He has worked closely with various financial institutions and is often sought by commercial clients to assist in identifying and managing risks.

Stephen also advises on contractual issues including IT contracts, joint venture agreements and partnership agreements.

As well as acting in purely litigation matters, Stephen also works closely with members of other practice groups within the firm, advising clients on matters that may have a litigation potential.

He is a regular speaker at seminars on litigation and insolvency issues.

Stephen brings to the firm a wealth of experience to complement our existing Commercial Litigation and Reconstruction & Insolvency teams. His arrival adds strength and a new dimension to these areas of the firm.

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