

Summer of Destruction

Undeniably, summer brought with it the worst spate of natural disasters most of us can remember, and most will hope to forget. The resulting damage to property has inevitably raised a number of legal issues.

Contract Terms

Clause 8.1 of the REIQ residential contract (8th edition) passes the risk in the Property to the Buyer from 5pm on the first Business Day after the Contract Date. Relying solely on the standard terms of the contract, purchasers could not refuse to settle or claim compensation because of damage to or destruction of the property, highlighting the importance of the purchaser taking out insurance.

The ADL form of contract contains terms that more directly address the rights and obligations of the parties regarding the condition of the property. For example, the vendor has an obligation to maintain insurances so long as the vendor remains in possession. Furthermore, the seller must deliver the property at settlement without damage or change in its condition as at the contract date (fair wear and tear excepted). If there is damage, the purchaser has a contractual right to claim compensation from the vendor for the reasonable cost of rectification, provided notice is given before settlement.

Legislation

If the property is destroyed or damaged to such an extent that it is unfit for occupation, s64 of the *Property Law Act* enables the purchaser to rescind the contract before either completion or possession. The damage or destruction must also occur before completion or possession (whichever is earlier). In February, 2011 the Supreme Court considered a purchaser's right of rescission in *Dunworth v Mirvac*. In that matter, the purchaser had attempted to avoid her off-the-plan contract for a \$2.3m unit at Tennyson Reach on grounds of misrepresentation and other technical legal points. The developer applied for specific performance in December, 2010 and the court ordered an extension of the settlement date to a date in February, 2011. The Brisbane floods intervened in January, and the purchaser gave notice to rescind the contract under s64 of the *Property Law Act*. In the meantime the developers had been working frenetically to repair the flood damage to the unit by replacing sections of gyprock wall sheeting, replacing wiring and electrical switches and checking appliances for damage. The court observed that there must be an assessment of the degree of damage to satisfy the wording of s64, because the section demands that the property must be so destroyed or damaged as to be unfit for occupation as a dwelling, but the court also considered the possibility that the damage could be caused in part by the flood and partly by the work carried out by the developer after the flood, when rectifying the flood damage. Pending further court attention in that matter, the observations of the court may lower the bar when trying to prove that damage has rendered the property unfit for occupation, if one of the reasons the property cannot be occupied is because repair work is not completed.

If a purchaser does not wish to rescind, the purchaser is entitled to claim coverage under the vendor's insurance by virtue of s50 of the *Insurance Contracts Act*. The insurance cover commences on the day the risk passed to the purchaser and ends either when the sale is settled or terminated, the purchaser enters into possession of the building or when the purchaser effects insurance. However, if the purchaser intends to rely on this section, they will be at the mercy of whatever insurance the vendor has already effected. This includes the amount of the insurance and the insurer's financial stability. The insurer is also only liable to pay the purchaser if there is liability to the vendor.

Insurance

There is no legislative obligation on the vendor to maintain insurance policies over the property until settlement of the sale. Purchasers should not rely on the vendor to maintain insurances, nor should purchasers rely on the statutory protections under the *Property Law Act* or *Insurance Contracts Act*. In all cases, purchasers should take out adequate insurance immediately after signing a contract. This should also apply to purchases of vacant property, as a protection against liability for personal injury or other third party damage that may occur on the property.

Feedback Kelly Conveyancing is the residential conveyancing division of Kelly Legal. This newsletter is intended to provide an information network for the 'value chain' of the residential housing market for accountants, financial institutions, mortgage brokers, residential real estate agents, as well as buyers and sellers of residential property. Feedback on this edition of 'Clear Title' or suggestions for topics in upcoming editions may be forwarded to Paul Kelly at paul.kelly@kellylegal.com.au or on direct line phone number 07 49110510.