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Buyer's waiver of a special condition

A recent decision of the Queensland Supreme Court (McMurdo J) raises matters of interest for practitioners undertaking conveyancing. *Woodward v Nagel* [2003] QSC 100 was delivered on 11 April 2003.

Facts

A contract for the purchase of a house and land provided for a settlement date of 24 April 2003. A relatively common form of special condition provided that the contract was conditional upon completion of the sale of the buyer's house on or before 26 March 2003. If the condition was not satisfied (without default by the buyer) the contract was to be at an end and all deposit money refunded.

On the 26th March the seller's solicitors sent the following fax:

"We note that special condition 1 of the contract was due to be satisfied today. Please provide your urgent advices with respect to the sale of your clients' property."

On the 27th March 2003, the buyer's solicitors responded in these terms (which were to prove critical):

"We refer to your fax dated 26 March 2003. Our clients' sale has been extended to 24 April *to coincide with the completion of this matter.*" (italics added)

In response to this fax, the seller's solicitors purported to terminate the contract on the basis that the special condition had not been satisfied by the due date and no extension of this date had been either sought or agreed.

The rights of the parties

Buyer

It was common ground that the special condition was for the benefit of the buyer. On this basis the buyer was entitled to waive the special condition at least up until the 26th March and arguably at any time prior to termination by the vendor (for non-fulfilment of the condition).

Seller

If the special condition had not been fulfilled by 26 March, the condition then became one for the benefit of both parties as the seller has an interest in knowing for how long its liability was to remain unresolved (per Windeyer J in *Gange v Sullivan* (1966) 116 CLR 418). Accordingly, the seller would be within its right to terminate the contract for non-fulfilment of the special

condition by the due date unless there had been a prior waiver of the special condition by buyer.

Judgment

The sole issue for determination by McMurdo J was whether the fax of 27th March 2003 constituted a waiver (by the buyer) of the benefit of the special condition.

Waiver applies only where there are alternative rights inconsistent with one another and a party acts, with knowledge of the facts giving rise to the law applicable to the rights, in a manner consistent only with that party having chosen to rely on one of them (*MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320, [45]). Was the fax only consistent with the buyer intending to complete and forgoing its right to rely on the special condition to terminate if its own sale did not eventuate?

Whilst the fax made it plain that the special condition had not been satisfied by the due date, the fax did not expressly say that the buyer was waiving the benefit of the special condition. Notwithstanding that there was no express statement of waiver, McMurdo J treated the reference to '*the completion of this matter*' as an unequivocal statement that the buyer intended to complete. Justice McMurdo determined that this statement, coupled with the statement that the special condition had not been fulfilled, constituted an effective waiver of the special condition.

For the vendor it was submitted that the fax, rather than constituting a waiver, was a purported unilateral variation of the contract, extending the date for the satisfaction of the special condition from the 26 March until the 24th April. This submission was rejected. Whilst the buyer could waive the benefit of the special condition, the buyer had no entitlement to unilaterally vary the special condition. On this basis McMurdo J considered it was appropriate to construe the words used in the fax by attributing to the buyer an intention to act consistently with the buyer's entitlements under the contract.

As Justice McMurdo concluded that the fax was an effective waiver, the seller's purported termination was not effective. In the result, the contract was enforceable against the seller.

Comment

This decision raises issues of interest for the legal representatives of both buyers and sellers.

It would be interesting to speculate, when the fax of 27 March was sent, whether it was the buyer's intention to waive the benefit of the special condition by making reference to '*the completion of the matter*'. Ideally, to communicate waiver of a special condition, express language to that effect should be utilised rather than alleging waiver by necessary inference from the language used. Conversely, if what was being sought was a mere extension

of the date for fulfilment of the special condition, a clear request in these terms would have clarified the situation.

Two hypothetical situations, based on the same factual premise, may help to demonstrate these propositions.

Hypothetical One

In hypothetical one, assume the seller's response to the fax of 27 March had been to inquire if the buyer was waiving the right to rely on the special condition to terminate if their own sale fell through. What might the response have been? It is speculation, but only an intrepid buyer would usually waive their right in these circumstances. Of course, if the buyer did choose to waive their right at that time the position is made clear for all concerned. However, a response that would be far more commonly encountered would be for the buyer to seek an extension of the date for satisfaction (or otherwise) of the special condition. Faced with a request for an extension, the seller would be quite entitled to deny the extension, if they so desired. If the special condition was not satisfied by the due date, and the date not extended, the seller could then terminate the contract (in the absence of waiver by the buyer). In the reported decision, the right to terminate was, it seems, the result desired by the seller but denied due to the buyer's earlier waiver.

Hypothetical Two

In hypothetical two, assume that the seller's solicitors (without further inquiry) treated the fax of 27 March as constituting a waiver of the buyer's rights under the special condition. In this hypothetical situation the seller would then prepare for settlement. Unlike the reported decision, what if the buyer was unable to sell their own home by the due date for settlement (24 April) and the buyer then purported to terminate the contract for non-satisfaction of the special condition?

The risk for the seller in adopting this course of action (apart from the need to resort to litigation to determine the dispute) is that the buyer's fax of 27 March may be construed as being equivocal in its terms. The risk arises because the buyer has not indicated waiver in express terms. The language employed could mean the buyer would be in a position to complete, provided the sale of the buyer's own home occurred by the 24th of April. In effect, the fax of 27 March could be viewed (rather than as an attempt to unilaterally vary the contract) as merely a form of request for an extension of the special condition date, although not expressly articulated in this form. If this argument were sustained, the requirements of waiver would not be satisfied and the buyer would be entitled to terminate the contract for non-fulfilment of the special condition.

These hypothetical examples demonstrate the desirability of using precise language in conveyancing correspondence and the need to seek clarification where precise language is not employed.

From the buyer's perspective, if waiver were intended, the matter would have been put beyond doubt if the fax of 27 March simply said:

"Our client waives its rights under special condition 1 of the contract."

From the seller's perspective, both hypothetical examples demonstrate the advantage of seeking clarification if there is any concern that correspondence may be equivocal in its meaning. By simply asking if the benefit of a special condition is being waived, or alternatively, if an extension is being sought, the position is clarified and risks averted.

The decision serves as a timely reminder of the prudence that needs to be exercised in standard conveyancing transactions.

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