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What to do if the Contract for the Sale of Your House 'Falls Over'

Business & Property Team

Our clients are sometimes faced with the dilemma of what to do when the contract for the sale of their house 'falls over'.

For the purposes of this commentary, we will assume that the buyer is in default to settle and has therefore failed to comply with an essential term or is in a fundamental breach of an intermediate term of the contract. In this regard, the latest version of the Real Estate Institute of Queensland (**REIQ**) contract provides as follows:

Clause 9.1 –

"Without limiting any other right or remedy of the parties including those under this contract or any right at common law, if the… Buyer… fails to comply with an essential term, or makes a fundamental breach of an intermediate term, the Seller…. may affirm or terminate this contract."

Clause 9.2 –

"If the Seller affirms this contract under Cause 9.1 it may sue the Buyer for:

- *damages,*
- *specific performance, or*
- *damages and specific performance."*

Clause 9.4 –

"If the Seller terminates this contract under Clause 9.1, it may do any or all of the following:

- *resume possession of the property,*
- *forfeit the deposit and any interest earned,*
- *sue the Buyer for damages,*
- *resell the property."*

To 'affirm' the contract simply means that you will be holding the other party to the contract and may, ultimately, approach the court for an order that the buyer must proceed with the contract (**specific performance**).

When the buyer is in default, you need to decide what to do – affirmation or termination.

For the sale of residential property, affirmation of the contract is often not advisable as the seller will have to maintain the property and pay the mortgage, and may be financially stretched for quite some time.

Even if court proceedings are ultimately successful, the buyer may be a 'person of straw' and the seller will then be ultimately faced with the situation where the court proceedings were successful but it is impossible to recover any money from the buyer.

Bankrupting the buyer may provide some satisfaction but often does not yield any money.

In view of this, it is usually more advisable for a seller to terminate the contract and resell the property. (This is not always the case and you need to obtain legal advice about it.) In this way, the seller is able to limit the damage suffered and it may even be that on the resale, a similar contract price (or even more) may be achieved.

Sellers should however be careful to not simply resell the property for any price and think that they will automatically be able to recover the difference from the buyer.

In the case of Tynan v Filmana Pty Ltd (No 2) [2015] QSC 367, a property was sold for $7 million and, when it failed to settle, was then after some time resold for $4.8 million. The seller then sued the buyer for the difference plus other damages. The seller alleged that the property was sold for market value but the buyer maintained the contrary and argued that market value was in fact $6,665,000.

On behalf of the buyer it was also contended that the property was not marketed properly and therefore the best sale price was not achieved. The court referred to the well-known principle that the sale price may be considered in deciding market value and may be quite important but is not conclusive. Other factors may also be considered. (That case commenced on 5 July 2012 and is still continuing.)

At Quinn & Scattini Lawyers, our Property Law and Commercial Litigation Teams are ready to assist you and provide guidance when you are faced with problems arising from what may be the largest financial transactions you may enter into.

Issues that May Arise When Buying Units and Townhouses Off-the-Plan

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Buyers who wish to buy brand new units and townhouses will most likely buy off-the-plan. The concept of buying off-the-plan involves a buyer entering into a contract to purchase a property that has yet to be built. This article highlights some of the issues that buyers should consider when buying off-the-plan.

The first problem that buyers face is that they cannot see what they are buying. They have to make their assessment based on plans and drawings and possibly a model of the building. Some buyers may be comfortable with this but others may not be comfortable in which case buying off the plan may not be something for them.

Leading on from this, there have been cases in the past where a buyer has entered into a contract expecting certain views from the unit only to find that when the unit is built the unit has restricted views.

Off-the-plan residential developments can take a number of years to develop, particularly the larger developments. Construction finance will often be conditional upon the developer securing a designated amount of pre-sales after which the developer then needs to carry out and complete construction and then have a survey plan registered at the Titles Office to create separate titles for the units or townhouses.

The off-the-plan contract will have a sunset date by which the building must be constructed, the titles created and the sale settled. The sunset date in off the plan contracts will vary but under the relevant legislation developers can have a sunset date of up to 5 ½ years. Therefore, buyers must be prepared to commit themselves to the purchase over a long period during which the buyers' personal circumstances may change.

The property market fluctuates over time. A buyer entering into a long term contract will hope that property values will increase over the term of their contract so that when they settle the contract the property will be worth more than (or at least remain the same as) when they entered into the contract.

However, this is not always the case and we have known situations where prices have declined over the term of the contract and the property is worth less at settlement than when the buyer entered into the contract. This in turn can lead to problems if buyers are relying on bank finance to settle.

Obtaining finance for off-the-plan contracts is another issue that buyers needs to carefully consider. While banks can give an indication that finance is available before or when the contract is entered into, the banks will often reassess the situation when the unit or townhouse is built both in terms of carrying out a valuation of the property and assessing the buyer's personal circumstances at that time and thereby the buyer's ability to repay the loan. There is always a risk that the bank will not provide finance at settlement which will leave the buyer facing a breach of contract claim if unable to settle.

It is important that buyers ensure that the contract clearly defines the finishes, fixtures and furnishings that are included as these have the potential for misunderstanding and dispute.

These are just some of the issues that buyers must consider before entering into an off-the-plan contract. Off-the-plan contracts are not standard contracts like the REIQ contracts and the terms vary from contract to contract.

The contracts come with a large bundle of disclosure documents and it is imperative that buyers have the documents scrutinised by a lawyer before entering into the contract.

Recent Changes to Domestic Violence Laws – What Does It Really Mean?

Recently, the Queensland Government enacted new legislation resulting in some significant changes to the domestic violence laws in Queensland. The *Criminal Law (Domestic Violence) Amendment Act 2015* was passed on 15 October 2015.

A summary of the changes that this new legislation has created include:

1. The maximum penalty for an offence of domestic violence has increased. The maximum penalty is now 120 penalty units (currently $14,136) or three years imprisonment, whereas previously the maximum penalty was two years imprisonment.
2. The maximum penalty for committing a subsequent offence of domestic violence has also increased. This means that if the offender has, within the previous five years, been convicted of a domestic violence offence, the maximum penalty for contravening an order is 240 penalty units ($28,272) or five years imprisonment. Previously the maximum penalty was three years imprisonment.
3. Section 1 of the criminal code now includes a definition of domestic violence. This means that any offence committed in the context of a domestic or family relationship will be considered to be an offence of domestic violence.
4. If a court takes the view that the matter is serious in nature and the imposition of a sentence of three years imprisonment or less would be inadequate, the matter must be heard on indictment, and as such, be committed to the District Court for finalisation.
5. A person, against who it is alleged domestic violence has been committed, will be deemed to be a 'special witness'. It is likely that this will mean that specific measures will be taken when those persons are giving evidence about the matter. These could include screens being put in place, support personnel being present and even evidence being given remotely or pre-recorded.
6. The prosecution can apply to have previous offences declared as domestic violence offences. This means that the offender's criminal history will be updated and amended.

Further changes were made to the *Domestic and Family Violence Protection Act 2012* on 17 December 2015. Specifically, these are summarised as follows:

1. The court must hear cross application together, whereas

previously this was at the discretion of the court.

2. A court must consider whether an ouster order prohibiting the respondent from attending at the matrimonial home is a necessary inclusion in any temporary and final order. The court can take into account the view of the aggrieved person.
3. All courts must also now have regard to a victim impact statement in applications for a protection order to ensure that victim is being heard.
4. An aggrieved can appeal a decision made by a magistrate to refuse to grant an application for a temporary order.

There is a further bill currently before parliament, entitled Criminal Law (Domestic Violence) Amendment Bill (No 2) 2015. Perhaps the most significant of the proposed amendments contained in that bill is the inclusion of a new offence under the criminal code, namely, '*choking, suffocation, and strangulation in a domestic setting'*. The maximum penalty for such an offence would be 7 years imprisonment.

If this bill is passed as law, it will undoubtedly generate further changes to the current laws surrounding domestic violence.

If you would like to discuss any matter involving domestic violence please contact our Criminal Law Team.

Eligibility to Seek Further Provision from an Estate

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Quinn & Scattini Lawyers' Wills & Estates Team regularly represent clients who want to contest what they are receiving under a will, or who want to contest the share of the estate they are receiving under the rules of intestacy when the deceased person has not made a will.

Section 41 of the *Succession Act 1981* ("**the Act**") provides that if a person dies, with or without a will, and adequate provision is not made for the proper maintenance and support of the deceased's spouse, child or dependant, then the court may, in its discretion, on application by or on behalf of the spouse, child or dependant, order that provision be made out of the deceased's estate for the spouse, child or dependant.

It is important to note the three categories of persons who are entitled to make an application under section 41. The Act defines "spouse" as the husband, wife, de facto partner or registered partner of the deceased. In respect of a de facto partner, the deceased and the de facto partner

must have been living as a couple on a genuine domestic basis. In deciding this, any of their circumstances may be taken into account, including whether they were living in a common residence, the length of their relationship, whether or not a sexual relationship existed, the degree of financial dependence or independence, their ownership and use of property, their commitment to a shared life, the care and support of children, the performance of household tasks and the perception of their relationship by members of the public.

It is also necessary that the de facto couple has lived in a relationship for a continuous period of at least two years which only ended on the death of the deceased person.

The Act defines 'child' in relation to a deceased person to mean any child, stepchild or adopted child. There are special rules relating to the meaning of a stepchild. If the parent of the stepchild dies while still married to the deceased then the deceased has an obligation to provide for the stepchild from the deceased's estate.

However if the marriage between the stepchild's parent and the deceased ended before the death of the deceased then the deceased does not have an obligation to provide for the stepchild.

The Act defines 'dependant' in relation to the deceased person as being any person who was being wholly or substantially maintained or supported by the deceased at the time of the deceased's death and who is:

- a parent of the deceased; or
- the parent of a surviving child of the deceased under the age of 18 years; or
- a person under the age of 18 years.

So a person wanting to apply for further provision from a deceased person's estate must be a spouse, child or dependant of the deceased person.

There are other factors which are relevant in this type of application, such as the nature of the relationship between the deceased person and the applicant, and the financial circumstances of the applicant.

An eligible person wanting to make an application for further provision from a deceased person's estate must give notice of their intention to the executor within six months after the date of death, and must file their application in court within nine months after the date of death.

If you want to make an application for further provision from a deceased person's estate, you should contact Quinn & Scattini Lawyers promptly.

Post Separation Spending

Family & De Facto Law Team

A common misconception that we see regularly amongst family law clients is that once you have separated, you don't have to explain or account for your post separation finances. Many clients mistakenly believe that only the assets which existed at separation are taken into account and that an examination of what occurred after separation is irrelevant. If only it was that simple.

In reality there is a lot of 'accounting' that takes place after separation, but before a property settlement can be achieved. A property settlement takes into account all of the assets of the parties as at today, whenever today is. It is for this reason that, as a family lawyer, we (generally) advise clients to attend to their property matters sooner, rather than later. In our experience, leaving things can often make settlements messy and, on occasions, unduly complicated.

Disclosure is an important step which must be undertaken before negotiations can really take place. The exchange of bank statements (amongst other documents) allows parties to demonstrate that they have taken steps to minimise the disruption separation has on the family's finances.

It is an unfortunate reality that separation means parties now have two households to maintain, with the same amount of income that was previously applied to the one family home. This often leads to parties becoming frustrated at what they see as reckless spending on the part of their former spouse/partner.

Post separation spending is a very contentious issue. For example at separation you have $15,000 in savings, perhaps sitting in a joint offset account reducing the interest payable on the home loan. Then your former partner/spouse withdraws $10,000 from the account. Do they have to pay it back into the pool? What if they use that money to pay bond, rent and purchase some basic furniture and effects?

Another example might be; what about if they (the other party) sells a real property or business that is registered in their sole name and keep the profits after the loans associated with the asset are paid? What if they don't payout the debts associated with the asset at all? Do such things need to be accounted for in the property settlement?

The answer isn't always simple and, since the High Court of Australia's decision of Stanford[1], the answer is even more uncertain than ever before.

Historically the family law courts have taken the view that if a party has taken steps to reduce the value of the property pool or they have acted recklessly with matrimonial assets, then the court can take that behaviour into account and can reallocate the loss to the person who caused the loss[2].

An example of this occurring is where Spouse A allows a person to live in a rental property without paying rent as opposed to tenanting the property with someone who can pay fair market rent for occupying the property.

Stanford added to the complexities of 'add-backs' and 'wastage' arguments – because that case changed the way that that we are required approach all family law property cases.

Now the starting point for determining a family law property settlement is a consideration of whether it is just and equitable to alter the existing legal or equitable interests of the parties. From a legal point of view, if step one of the process is to consider the existing legal and equitable interests of the parties, how do you account for an asset which no longer exists?

It follows (logically in our view) that if we don't take into account the sale of an asset and its subsequent use by that person to the exclusion of the other spouse/partner, it is unfair to the person who has not sold or dissipated an asset that it not be accounted for in the property settlement.

Case law demonstrates that if a party applies money to general living expenses, it is not appropriate to notionally add back that sum into the property pool[3].

If we return to the example above where the spouse removes $10,000 from the joint offset account, and that party applied those funds to paying rent on a new property (having left the former home), paying the ordinary expenses of food, cleaning supplies, electricity, fuel, insurance and the like, in our view it is highly unlikely that the court would notionally add that sum of money back into the property pool.

However if those funds were applied to pay legal fees, they are highly likely to be notionally added back into the pool. 'Notionally added back' means the court treat the asset as still existing when they calculate the property pool before it is divided between the parties and allocated to the person who had the benefit of it (i.e. used/disposed of it).

A recent full court decision of Talbot[4] shows how the issue of add backs is still alive, and uncertain. In that case, the husband successfully appealed a decision which notionally added back into the matrimonial property pool some $252,251 which he had received shortly prior to separation. The husband had sourced those funds from the sale of a real property which he then used to purchase a business and meet his general living expenses after separation.

In this case the wife argued that the net sale proceeds of the house amounted to a premature distribution of property to the husband and should be 'notionally added back' into the property pool.

The trial judge agreed with her; however the appeals court did not, taking the view that the court needed to look at how the money was spent by the husband before determining whether the money spent should be treated as though it still existed (that is, treated as an 'add back').

In this case, whilst some of the money was applied to the purchase of the new business, evidence demonstrated clearly that the balance was applied to general living expenses such as food, health care and the like.

Unfortunately the case was remitted for rehearing and, as at the date of preparing this article, the outcome is unknown.

In our view it is in all clients' best interests to get legal advice as soon as practicable. Sometimes this means getting advice before you actually separate. Regardless, obtaining sound advice early on means that you can implement strategies which work in your short, mid and long-term best interests. It also means that you understand what (if any) impact your decisions may have on your ultimate property settlement.

Knowing those consequences can make all the difference between an uneventful, cost effective settlement and protracted litigation.

[1] Stanford v Stanford (2012) FLC 93-518
[2] Kowaliw (1981) FLC 91-092
[3] Marker & Marker [1998] FamCA 42, Cerini & Cerini [1998] Fam CA 143
[4] Talbot & Talbot [2015] FLC 93-660

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