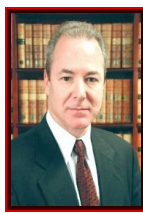


Property & Probate Law

Recent Case studies by David Lloyd



Solak v Bank of Western Australia Ltd & Ors [2009] VSC 82

This decision well and truly sets the cat amongst the pigeons on the question of enforceability of a forged all-monies mortgage against the defrauded mortgagor.

In a series of cases in New South Wales over the last few years, the most recent one being *Provident Capital Ltd v Printy [2008] NSWCA 131*, the position has consistently been taken that whilst registration of the mortgage confers indefeasibility on it because there has been no fraud on the part of the mortgagee, the position is otherwise so far as the loan agreement is concerned: it is void on account of the fraud, and because the mortgage secures payment obligations under a void document and hence effectively secures nothing, there can be no default in payment on the part of the mortgagor which might give rise to the mortgagee's statutory power of sale.

The learned judge in *Solak* arrived at the opposite conclusion, on the basis of construction of the terms of the mortgage and in particular the memorandum of common provisions referred to in it.

Clifford v Solid Investments Australia Pty Ltd [2009] VSC 223

This is another potentially controversial decision. It concerns so-called off-the-plan sales, where the subject matter of the contract is a lot on an unregistered plan of subdivision.

Such contracts are regulated by the Sale of Land Act 1962. Relevantly for present purposes, s. 9AE (2) provides to the effect that if the plan is not registered within 18 months of the day of sale the purchaser can avoid the contract altogether, although it allows a different time period to be "specified" by the contract.

It has been commonplace for many years for off-the-plan sale contracts to specify a different period, and at the same time allow for the vendor to extend the period in the event of delay on account of force majeure type events.

Until now, no-one has questioned the efficacy of such provisions.

However, in *Clifford* it was effectively held that s. 9AE (2) requires a fixed date to be substituted for the statutory default period of 18 months, and that extension of time provisions in the contract could be ignored by the purchaser.

The impact of this decision on existing uncompleted off-the-plan contracts cannot be underestimated.

Also noteworthy is the learned judge's endorsement of the approach taken in *Everest Project Developments Pty Ltd v Mendoza* [2008] VSC 366 with regard to the inapplicability of the doctrine of waiver to the exercise of statutory contract avoidance rights.

***Munro v Humphries* [2008] VSC 600**

This case also concerns the operation of the *Sale of Land Act 1962* and illustrates how a cash contract can accidentally become a terms contract for the purposes of the legislation where the contract gives the purchaser the right to possession prior to completion. In *Munro*, the estate agent added a hand-written special condition giving the purchaser immediate possession of the property, and it was held that the contract was caught by the terms contract provisions of the legislation. The purchaser was able to avoid the contract as a consequence.

Recent amendments to the *Sale of Land Act 1962* concerning terms contracts are mentioned below.

***Tote Tasmania Pty Ltd v Garrott* [2008] TASSC 86**

This is a significant decision of an intermediate appellate court - which included Buchanan AJ and Mandie J – on the subject of implied terms of good faith in contracts.

It is appropriate to quote verbatim from the judgment, at [17]:

“ Whether a power conferred upon a party to a contract is fettered by a duty of good faith depends upon the terms in which the power is expressed. Without purporting to compile an exhaustive list, there are at least three types of contractual powers which suggest different results. One is a provision conferring a power in an agreement, such as a partnership agreement, which is concerned with co-operation between the parties to produce a result which benefits all the parties to the contract. In such an agreement, a court might readily imply an obligation to act in good faith in that the party upon whom the power is conferred must have regard to the interest of all the parties to the agreement. Another type of provision is one which confers a power if the donee of the power considers that a certain state of affairs or condition exists. In this case, a court may well hold that the power can only be exercised by an honest decision that the state of affairs or condition does exist, but the honest exercise of the power will not be reviewed by the court. Yet another type of provision is one conferring a power that is quite unqualified. Here, a court may conclude that the power can legitimately be exercised in the interests of the party upon whom it is conferred and that party is to be the sole judge of where its interests lie and may exercise the power for any reason it sees fit.”

LEGISLATION

The *Sale of Land Act 1962* was amended in late October last year. A new Division 4 contains ss. 29A to 29V concerning terms contracts, replacing the former ss. 2 to 7.

Importantly, it would seem from s. 29A that a terms contract can no longer be created from multiple payments between the day of sale and settlement. This is so because

the definition of “deposit” catches all payments before completion, so that there can never be “two or more payments other than a deposit or final payment” in order to create a terms contract based on the number of payments.

Whether this consequence was intended by Parliament or resulted from poor drafting of the section is another matter altogether.