

Property Law Update

Autumn 2011

Changes to Commercial Building Disclosure

by Maria Katsiaris, Senior Associate

Building Energy Efficiency Disclosure Act

The *Building Energy Efficiency Disclosure Act 2010 (Cth)* ("the Act") and accompanying Regulations commenced on 1 July 2010.

The Act prescribes new disclosure requirements which commenced 1 November 2010.

The Act also established the Building Energy Efficiency Scheme ("Scheme") which provides that:

1. Corporations must not offer to sell, lease or sublease disclosure-affected premises without a Building Energy Efficiency Certificate ("BEEC");
2. Corporate owners, lessees and sublessees must provide prospective purchasers, lessees and sublessees with a BEEC upon request; and
3. Corporations must not advertise disclosure-affected premises for sale or sublease without including a valid and current Energy Efficiency Rating in the advertisement.

Disclosure-affected buildings are commercial office buildings that:

- a. comprise at least 2,000 square metres of space used for the types of activities that would usually take place in a commercial office;
- b. are not strata titled; and
- c. have been certified for occupation more than 2 years ago (in the case of a new building).

During the first 12 months of the Scheme, a building owner or landlord can register with the Department of Environment Climate Change & Water, and instead of disclosing a BEEC may disclose a National Australian Built Environment Rating System ("NABERS") base building rating when selling, leasing or subleasing.

However, from 1 November 2011 a full registered BEEC will be required.

Changes

On 29 November 2010 additional changes came into effect with the commencement of the *Building Efficiency Disclosure (Disclosure Affected Building) Determination 2010 (No.2)* which further specified the types of buildings that will require a BEEC.

Some of the changes include the following:

1. Mixed use buildings

Mixed use buildings which combine office space with other functions such as warehouses, vehicle centres, hotels or retail outlets are now disclosure affected if the office component of the buildings is 75% or more of the net lettable area of the building.

Action

A building which is 2,000 square metres or more, with less than 75% office space is an exception to the Act and therefore those buildings are not disclosure affected and no action is required.

Owners of buildings that are below the 75% threshold may of course, wish to voluntarily comply with the legislation.

2. Refurbishments

Owners of buildings which have had major refurbishments that will have a substantial effect on the energy performance of the base building will not be required to disclose an Energy Efficiency Rating for 2 years from the date when the certificate of occupancy is issued.

Major refurbishments are those that involve substantial changes being made to the fabric, plant or equipment in the building and require a certificate of occupancy being issued under a law of a State or Territory prior to the building being occupied or reoccupied.

Action

If a building has undergone major refurbishment it is classed as an exception to the Act for two years after the issue of the occupation certificate and no action is required during that time. However, after two years of occupancy, building owners will need to comply with the Act and disclose an Energy Efficiency Rating.

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Real Estate Agents – Agency Agreement

by Ned Boyce, Partner



Vendors of real estate need to be careful that they fully understand the terms and conditions of the agency agreement offered by their real estate agent.

Whilst attention is often focused on the commission rate, exclusive agency period and the rights of the agent to recover expenses, vendors should always establish what the arrangements are if a sale does not proceed after a contract for sale has been entered into for the property.

In New South Wales the standard agency agreement published by the Real Estate Institute of New South Wales includes the following provision:

“The fee to which the Agent is entitled shall be due and payable on completion of the sale or upon demand if the sale is not completed owing to the default of the Principal after the parties have entered into a binding contract or if after the making of the contract the Principal and the purchaser mutually agree not to proceed with the contract.”

The Institute has recently amended this provision to also provide if the contract is not completed due to the default of a Principal that he/she will still be required to pay commission to the agent.

If a sale does not proceed because of a default by the Principal should the agent be entitled to commission? There could be a range of “defaults” by a Principal which may cause a contract to be not completed. Such a default may arise from circumstances which may not necessarily be under the control of the Principal. Should the agent nevertheless receive its commission?

If the failure to complete the contract arises from a default by a purchaser it is true that in most cases the vendor will receive the forfeited deposit which will usually be 10%. In those circumstances it may seem reasonable that the agent should be recompensed for its endeavours but should it be recompensed for the full amount of the commission or for some discounted amount? In addition the reason for

the default by the purchaser may arise from some inadequate screening of the purchaser by the agent as to the capacity of the purchaser to complete the contract.

Vendors should be aware of the circumstances under an agency agreement where the agent will be entitled to be paid commission. We suspect that some vendors would be surprised to know that they are required to pay commission if a contract is terminated by reason of a default of the Principal or the purchaser or perhaps in some cases just by mutual agreement.

In our experience, vendors do not usually seek legal advice on the terms and conditions of an agency agreement. We are available to advise in relation to those agreements at the time that we receive instructions from you to prepare a contract for sale to enable an agent to list a property. If you have already signed the agency agreement it may be too late to negotiate any changes.

Rescission of a Sale Contract Following the Recent Floods

by Paul de Silva, Partner

A matter was recently heard by the Supreme Court of Queensland concerning a purchaser's right to terminate a contract for sale as a result of damage caused by the recent Queensland floods.

The case concerns Section 64 of the *Property Law Act 1974 (Qld)* and relates to a riverside development completed in 2009.

The Act

Section 64 states that in any contract for the sale of a dwelling house where, before the date of completion or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's solicitor not later than the date of completion or possession whichever the earlier occurs.

Case Background

In this case, the apartment was on the ground floor of the building and included car parking and storage on one of the basement levels.

The developer and seller, Mirvac, had previously called for completion after the Community Title Scheme was established. The purchaser unsuccessfully sought an order declaring the contract void and a new completion date was established as 8 February 2011.

The Brisbane River then flooded. Both basement levels of the building were inundated. Water entered the apartment on the ground floor. Mirvac made an open offer to the purchaser to clear up and restore the apartment to its original condition at Mirvac's cost. Mirvac sought to delay settlement so that it could do this. The purchaser rejected that offer and looked to rescind the contract in accordance with Section 64 of the Act.

The Court Action

The purchaser sought a declaration that the contract was duly rescinded.

The Supreme Court of Queensland noted that there were legal questions and related factual questions about the application of Section 64 including:

- the date at which *fitness* (i.e. fit for occupation) must be established
- the meaning of *fitness* and the relevance, if any, of the damage being capable of repair.

The Court found that these were matters which should go to trial and could not be determined in a summary fashion. The Court therefore found that the purchaser would be adequately protected by an order extending the date for completion. This would not prevent the Court determining whether or not the purchaser had a right to seek to rescind under Section 64 at a later trial.

Conclusion

The case is a reminder that regardless of the extensive damage caused by a flood, reliance on Section 64 of the Act (and equivalent provisions in other States) to rescind cannot be guaranteed and will be determined on a case by case basis.



Copyright Issues for Home Designs

by Tony Raunic, Partner, and Kelly Deakin, Graduate at Law

“Copyright” is a property right recognised in Australian law as a part of what are known as “intellectual property rights”. Copyright applies particularly to architectural plans and building.

Following previous successful copyright actions against Metricon Homes and Carlisle Homes, Porter Davis Homes has now had a third copyright victory against another builder, Dennis Family Homes.

Porter Davis Homes issued proceedings in the Federal Court of Australia against Dennis Family Homes alleging that Dennis Family Homes had infringed the copyright by copying the “alfresco quadrant” feature of the Porter Davis Homes design. That is, the combination of a rumpus, family, kitchen and meals areas around the alfresco, all under a single roof-line.

Justice Dodds-Streeton recognised that the creation of the house design incorporating an alfresco quadrant involved a prolonged and laborious design process sufficient to confer originality upon those designs. The Judge found that the alfresco quadrant designed and built by Porter Davis Homes was “both striking and distinctive” and differed

significantly from houses which included an alfresco that pre-dated the design and construction of the Porter Davis Homes alfresco quadrant. Accordingly, Porter Davis Homes was found to hold copyright in both the designs and the homes of the alfresco quadrant.

The Judge also found that Dennis Family Homes had access to the Porter Davis Homes’ designs and homes and would have been aware of the commercial success of the alfresco quadrant. It was held that Dennis Family Homes used this access to reproduce an almost identical alfresco quadrant.

The Judge therefore ruled that Dennis Family Homes had infringed the copyright which Porter Davis Homes holds in the designs and homes by reproducing the alfresco quadrant in their designs and subsequently building, marketing, promoting and selling homes constructed in accordance with these infringing designs.

The Federal Court decision means Porter Davis Homes will now be able to pursue damages or an account of profits (being a portion of the profits it has earned

for each individual house built and sold according to its design) from Dennis Family Homes, as well as its legal costs and interest.

This decision, like the previous decisions in the cases against Metricon Homes and Carlisle Homes, draws on the *Copyright Act 1968*. Material that is protected by copyright includes drawings and sketches of house plans, blueprints and floor layouts. This is especially relevant to architects, designers, draftsmen, builders and others in the building industry who need to remain aware of the legal consequences of referencing or reproducing a competitor’s design.

A final note of warning to Managing Directors and Product Development Managers – it may not just be the company which is found liable for copyright infringement; it could also be you. In the case of Metricon, the Court held that both the Managing Director and the Product Development Manager had authorised the copying of the alfresco quadrant and so were personally liable to Porter Davis Homes for copyright infringement.

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