Clear Title

August/September 2018 Issue

PROPERTY LAW CENTRE

Insight. Commitment

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Electronic Conveyancing

Property Law Centre has completed numerous electronic settlements and undoubtedly this number will increase as we transition towards the inevitability of **settlements by electronic conveyancing becoming mandatory**.

Arguably, there was a recent setback when mainstream media reported on a fraud that saw $250,000 unlawfully redirected by a hacker, leaving a young couple anxious and uncertain about whether their dream of owning their first home would ever come true. It's understood there have been reports of 2 instances of hacking where unknown persons gained unauthorised access to a practitioner's email accounts which have been described as isolated incidents.

PEXA have released a statement clarifying that their system was not hacked, it was a PEXA user whose system security failed, and PEXA also asserted that after 1.2 million transactions successfully completed on PEXA, instances of fraud and attempts of fraud have been incredibly low, and much lower than the paper process.

Reactions have ranged from calls for the rollout of electronic conveyancing to be delayed until these kinks are ironed out, to one land title expert recommending a public enquiry.

In response to customers' concerns, PEXA has introduced a consumer guarantee and has given an assurance they are working with conveyancers and lawyers to improve their own security and verification layers.

Our conveyancing team at Property Law Centre is constantly vigilant about ensuring the utmost client care and security in all property transactions. **We chose to be pioneers of electronic conveyancing** because we were certain of 2 things, it was inevitable and the best way to understand a new system is to start early.

We have delivered information and training sessions on the implementation of electronic conveyancing to a number of our professional colleagues in the property industry and if you are interested in having us come to you and deliver that information session or if you have any questions you think we can answer about the new technology, we are more than happy to assist.

For more information **phone our friendly team on 1300 765 488.**

Additional Foreign Acquirer Duty (AFAD) May Force Contract Termination

Imagine you are a New Zealand resident planning to emigrate to Australia.

You may be eager to secure your new home and sign a contract for a house or unit in Queensland. As a New Zealand national you might think you won't have to pay the additional foreign acquirer duty because of the special exemption granted to our Kiwi neighbours. **But beware the risk of being caught with a liability to pay AFAD.**

From 1 July 2018 the AFAD rate increased from 3% to 7% of the purchase price, in addition to the normal rates of transfer duty which may apply.

The special relationship with our neighbours across the ditch enables any New Zealand citizen who is the holder of a special category visa when entering into a transaction that involves AFAD residential land to be exempt from AFAD. The typical example is A New Zealand citizen residing in Australia who holds a special category visa when they enter into a transaction for AFAD residential land in which case they do not need to pay AFAD.

But compare with a New Zealand citizen residing in New Zealand who enters into a transaction for AFAD residential land in Queensland. Because they will not be the holder of a special category visa under the Migration Act 1958 AFAD will be payable.

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Recently we advised in a transaction where a New Zealand resident signed a contract to purchase a home in Queensland before moving across The Tasman Sea, where faced with the prospect of paying AFAD because they hadn't yet obtained their special category visa when they entered into the transaction, they sensibly decided to cool off and leave the house hunting until they arrived in the country with their special category visa.

But also consider the following pitfalls:

- AFAD will apply if evidence indicates that the purpose of entry into Australia is to avoid paying AFAD by obtaining a special category visa.
- If a New Zealand permanent resident enters into a transaction for AFAD residential land in Queensland AFAD will apply, as a New Zealand permanent resident will not be the holder of a special category visa under the Migration Act 1958 and is instead a foreign person for the purposes of AFAD.
- If a person is appointed in writing as an agent acting for another person (a principal) in an agreement to transfer dutiable property, AFAD will apply if the agent or principal is a foreign person. Where an agent is foreign, but the principal is not, AFAD will apply when the agreement is assessed. But, when the agent transfers the property to the principal, AFAD will be reassessed.

Owner and Builder Dispute Resolved in QCAT

Are you a builder who has agreed to allow a homeowner some control over the construction process? Or a homeowner who has insisted on offering some assistance during the building phase?

A recently published decision, in which **our construction litigation team represented the successful builder**, identifies the risks that can be associated with such an agreement as well as the consequences that arise when one party exceeds the boundaries of that arrangement.

When it comes to new home construction contracts, it's not unusual for a builder to allow a homeowner some degree of control over the construction of the property. These agreements can range from the builder providing the homeowner the flexibility of selecting a specific kitchen unit, to the homeowner carrying out labour on the work site. While these arrangements usually occur without controversy, in this case the parties ended up in QCAT **when one party exceeded the scope of the agreement**.

Following an unfortunate breakdown in the relationship between the homeowner and builder, both parties sought to terminate the contract, each alleging breaches by the other. Prior to the breakdown, there had been an agreement between the parties that the homeowner would choose the preferred tiling and painting contractors. The evidence before the Tribunal indicated that the breakdown in relationship arose in part due to the builder's concern that the homeowner was acting beyond the scope of their agreement.

- The builder was particularly concerned that the homeowner:
- Ignored instructions provided by the builder;
- Engaged and instructed subcontractors directly, without the authority of the builder; and

Arranged the installation of various items in circumstances where the homeowner was either not licensed to do so and had not been correctly supervised, would not be able to provide certification, or without prior engineering approval.

The Tribunal found that the homeowner had exceeded the bounds of the agreement by directly **engaging and instructing tradespeople without the authority or knowledge of the builder**, undertaking deficient work,

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performing unlicensed works personally, and failing to comply with instructions provided by the builder.

In doing so, the homeowner had shown that he no longer had an intention to be bound by the contract, had acted inappropriately, and had engaged in conduct making it impossible for the builder to fulfil his contractual obligations.

These obligations included the builder's obligation to ensure that **all building work carried out on site was carried out in compliance with the Building Code of Australia** and all relevant standards. Accordingly, the Tribunal found that the homeowner was in substantial breach of the contract.

The consequence of the Tribunal's decision was that the homeowner's purported termination was invalid and had no effect at law, as a party cannot rely upon their own breach of the contract to force a termination. Further, the Tribunal held that a non-completion claim made by the homeowner under the QBCC statutory insurance scheme was disallowed.

Supreme Court Victory for a David v Goliath Style Court Battle

When land developers release residential land imposing building covenants or design guidelines on buyers of land in that subdivision the developer's intention is to maintain the aesthetic amenity of the residential development so that as the land is released to market, it won't lose value.

And that's all fine until a land developer tries to impose those restrictive covenants in a way that's unlawful.

That's what happened in the Supreme Court case of Bettson Properties Pty Ltd & Anor v Tyler [2018] QSC 153 where the decision was handed down recently.

The case considered the installation of solar panels visible in a location from the road on the roof of a house constructed by the owner in a residential development. It's probably not insignificant that the house was located directly opposite the temporary sales office of the land developer who was still selling some of their land stock in the development.

The parties ended up in court when the developer sought to impose building covenants by demanding the solar panels be removed.

The case involved the interpretation of Queensland legislation that was introduced to promote sustainability measures.

The owner relied on a provision of the Building Act that provides that a covenant is unenforceable if it prevents a person from installing a solar water system or photovoltaic cells on the roof or other external surface of the building.

The court found that the developer could not lawfully enforce the removal of the owner's solar panels.

The owner's defence was successfully conducted by Patrick Kelly of our commercial and property litigation team with external counsel. While the developers have indicated they are likely to appeal the decision, head of our commercial and property litigation team Sean Kelly was quoted to say the decision of the Supreme Court was victory for common sense.

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