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BUYING A PROPERTY? BEWARE OF THE POWER OF SPECIAL CONDITIONS IN THE CONTRACT!

A recent case heard by the NSW Court of Appeal emphasises the power of special conditions in a contract for sale of land in NSW.

In most cases when land is offered for sale the person selling the land ("the vendor") ensures that a contract is available for the purchaser. By law there are certain documents that need to be attached to the contract such as a "Section 149 Certificate" showing the council zoning etc and a diagram from the water board which shows the position of sewer main services to the land. In the contract there are conditions that set out the rights and obligations of the parties. There is usually an agreed set of "standard" conditions which are published by the NSW Law Society and utilised by most solicitors and conveyancers. In addition to these "standard" conditions there are also usually extra conditions or "special conditions" which have been specially drafted by the solicitors for the vendor which may address aspects of the sale that aren't covered by the standard conditions, or may even modify the standard conditions.

The recent decision in *Nassif & Ors v Caminer* 2009 NSW CA highlights the need for purchasers to carefully consider the terms and scope of any "special" conditions to the contract and to seek advice from their lawyer regarding these conditions.

Facts of the case

In November 2006 the vendors and the purchaser entered into a contract for sale of land for \$5.6 million. A sales brochure given to the purchaser by the

vendor's agent stated that there was a "secure lease to 2009 to a well established tenant." The sales agent also told the purchaser, "I feel that this tenant is a secure tenant, he is only in arrears for the last month." The purchaser relied on this representation by the sales agent and entered into the contract. Completion of the sale was scheduled to settle on 16 March 2007. On 8 March 2007 administrators were appointed to the tenant and thereafter the tenant ceased trading. As at 15 March 2007, (one day before the contract was due to settle) the tenant owed \$253,850 in rent, interest and outgoings. The purchaser calculated the tenant had ceased paying rent in July 2006. Accordingly, despite being told in November 2006 by the agent that the tenant was only in arrears for the last month", in actual fact the tenant at that time was in arrears for rent for approximately five months.

The purchaser did not complete the contract on the required date. The purchaser made a claim against the vendors on the ground that the vendors (or their agent) had engaged in conduct that was misleading or deceptive with respect to the tenant of the property and the tenant's financial affairs. In response to the purchaser's claim the vendors terminated the contract due to the purchaser's failure to complete and claimed the deposit. The purchasers wanted the deposit returned to them. Importantly there was a special condition in the contract which stopped the purchaser from making "any claim in relation to any matter relating to the lease." The Court of Appeal held that the vendor was entitled to retain the deposit due to the



fact that, although the purchaser may have had a claim against the vendors, they had entered into a contract that had a special condition which said the purchaser could not make any claim against the vendors if it related to the lease. The Court of Appeal held that because the words used in the special condition were very broad they covered a claim made by the purchaser in relation to misleading or deceptive conduct regarding the lease and had the effect of denying the purchaser the capacity to make the claim.

In other words, if the single line special condition stopping the purchasers from making any claim in relation to the lease was not in the contract the purchasers would have been successful and had their deposit returned to them. However, because the vendors had inserted that special condition they were entitled to deny any claim by the purchasers and were able to retain the deposit. For both vendors and purchasers it is vital that they have their lawyer carefully attend to the special conditions contained in a contract and provide advice in relation to issues which could arise about those special conditions. Rankin Nathan Lawyers are always able to assist clients in their property transactions and, if you have any questions regarding this article or a proposed property transaction please contact our property law team.



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