

PROPERTY LAW CONFERENCE – 7 OCTOBER, 2009

LEGAL UPDATE AND NEW DEVELOPMENTS

A. Introduction

1. At the outset it must be said that any legal update and discussion of recent developments in the law must be impressionistic, subjective and cursory. This session will deal with recent significant cases dealing with property law disputes relevant to Victorian practitioners, including the important High Court case of *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8; (2009) 236 CLR 272.
2. The session will also deal with the Growth Areas Infrastructure Contribution (GAIC); how it operates and what triggers the contribution.

B. RECENT DEVELOPMENTS IN PROPERTY LAW:

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd:

3. *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; (2009) 253 ALR 1; (2009) 83 ALJR 390; (2009) 25 BCL 256; [2009] HCA 8; BC200900446 (“Tabcorp”) was handed down by the High Court on 12 February, 2009.
4. In that case the High Court held that the measure of damages, where the tenant had breached a covenant in a lease of office premises that it was not to make any substantial alteration or addition to the leased premises without first obtaining the written approval of the landlord (which was not to be

unreasonably withheld or delayed), was not the diminution in the value of the land caused by the breach but the cost of restoring the premises to the condition in which they would have been in if the obligation had not been breached. The trial judge found there was a breach of covenant but awarded damages in the sum of \$34,820 being the difference between the value of the property with the old foyer and the value of the property with the new foyer as constructed by the tenant. On appeal the Full Federal Court increased the amount awarded to \$1.38m, made up of \$580,000 for the cost of restoring the foyer to its original condition and \$800,000 for loss of rent while the restoration work was being undertaken. The High Court upheld the Full Court's decision.

5. The High Court rejected "the doctrine of efficient breach" and the tenant's attempt to impose a form of economic rationalism on the unwilling landlord (at [13]). It applied the *Robinson v Harman* measure of damages for breach of contract as applied by Oliver J in *Radford v De Froberville* [1977] 1WLR 1262 at 1273 and the previous High Court case of *Bellgrove v Eldridge* (1954) 90 CLR 613. It was not necessary for the Court to consider damages under Lord Cairns' Act (at [22]). The tenant may have been entitled to a betterment discount if it had been argued (at [24]). Assessment of damages at the time of the trial was permissible in the circumstances (at [26]).
6. *Tabcorp* was applied by the Western Australia Court of Appeal recently in *Willshee v Westcourt Ltd* [2009] WASCA 87 (per Martin CJ with Buss JA and Newnes AHA agreeing) in a case where the builder had used inferior quality limestone in the external cladding of a house. The trial judge found in favour of the plaintiff but only awarded him the cost of cleaning and sealing the limestone and some repainting assessed at \$9,290. The Court of Appeal

allowed the plaintiff's appeal and instead awarded him the much greater costs of, and associated with, replacement of the inferior limestone which the trial judge had assessed at \$257,977.91.

7. The Court pointed out (at [71]) that the question of whether or not the work is in fact undertaken is immaterial (relying upon *Bellgrove* at 620).

8. Reference is also made to *Gumland Property Holdings Pty Limited v Duffy Bros Fruit Market (Campbelltown) Pty Limited* [2008] HCA 10; (2008) 234 CLR 237 (where the High Court held, inter alia, the guarantor's obligations which extended to payment of loss of bargain damages touched and concerned the land and was thus enforceable by the assignee of the reversion without express assignment) and *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61; (2007) 233 CLR 115 (the High Court holding that a party may terminate a contract where there has been either a breach of an essential term or a sufficiently serious breach of a non-essential term by the other party. An essential term is one which the parties have agreed will always justify termination if breached. The common intention of the parties, expressed in the language of the contract and understood in the context of the contractual relationship it creates and the commercial purpose it serves, determines whether a term is essential. Whether a sufficiently serious breach of a non-essential term justifying termination has occurred is to be determined primarily upon a construction of the contract, after which a judgment about the seriousness of the breach and the adequacy of damages is made. Breaches of this kind are described as "going to the root of the contract" and involve the application of the doctrine concerning intermediate terms).

Sale of Land Act cases – selling “off the plan”:

9. Two recent important cases for Victorian practitioners dealing with the provisions of Division 1 of Part 1 *Sale of Land Act* 1962 (Vic) (“Sale of Land Act”)(which deals with the sale and subdivision of land) are *Everest Project Developments Pty Ltd v Mendoza & Ors* [2008] VSC 366 per Hargrave J (“Everest”) and *Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223 per Bongiorno J (“Clifford”).

Everest Project Developments Pty Ltd v Mendoza & Ors:

10. In *Everest*, Hargrave J held that the defendants were entitled to rescind contracts for the sale of land “off the plan” under s. 9AE(1) Sale of Land Act where the contracts were entered into in contravention of ss. 9AA(1) and 9AA(2) Sale of Land Act. The vendor which was a property developer had purchased properties at 200 Spencer Street and 55 Queens Road for development by the construction of residential apartments. It had building plans prepared and, as well, lodged plans of subdivision at the Titles Office for registration. Meanwhile the vendor sold units in the unregistered plans of subdivision to various purchasers. The defendants were the purchasers of 33 units in the development. During the development Everest was placed into external administration and another developer acquired control of it and completed the two developments.
11. Prior to registration of the plans of subdivision the defendants served notice of rescission purporting to rescind the contracts relying upon breaches under s. 9AA and 9AB of the Act.

12. In a helpful summary of the principles to be applied in construing the contracts, His Honour noted “(g)eneral principles of contractual interpretation require the Court to consider what reasonable persons in the position of the parties would have understood the words to mean by reference to the text of the agreement, the surrounding circumstances known to the parties and the purpose or object of the transaction. In interpreting the words and resolving any ambiguity, the Court should proceed in a common sense and non-technical way and give the agreement a commercially sensible construction. The Court should have regard to all of the words used in the agreement “so as to render them all harmonious with one another” and to ensure the “congruent operation of the various components as a whole.”

(Notes omitted, His Honour referring to such cases as *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451, [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, [40]; *Di Dio Nominees Pty Ltd, v Brian Mark Real Estate Pty Ltd* [1992] 2 VR 732, 740; *MLW Technology Pty Ltd v May* [2005] VSCA 29, [76]-[81]; *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19; [1997] AC 749, 770-1; *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; (2005) 221 CLR 522, [16]).

13. One of the conditions in the contracts meant that the deposit moneys payable by the defendants under the contracts of sale could be paid to Everest directly before registration of the plan of subdivision, in contravention of s 9AA(1)(a). It was held that this clause contravened s. 9AA(1)(a) of the Act which entitled the purchasers to rescind the contracts prior to registration of the plan of subdivision. Further, the vendor received the first instalment of the deposit direct from purchasers and paid these initial payments into its own bank account. This was a breach of s. 9AA(2) which also would have entitled the purchasers to rescind.
14. The difficulties for the vendor evidently arose because it chose to allow purchasers to pay deposits by way of deposit bonds in lieu of immediate

payment of a deposit. It was up to the vendor to ensure that the use of the deposit bond structure complied strictly with the Act. In *Everest* it did not. As His Honour stated at para 111, "(i)f the structure was sanctioned by the Court, another less scrupulous developer using the same structure could legally receive proceeds of a deposit bond prior to the registration of the plan of subdivision, and deal with those proceeds so as to take them out of the reach of the purchaser in the event that the plan of subdivision is not registered and the purchaser becomes entitled to a refund of the deposit. Such a result would be entirely inconsistent with the underlying purpose of ss 9AA(1), 9AA(2) and 9AE(1) of the Act".

15. His Honour also held that "the Act, upon its proper interpretation, excludes reliance upon doctrines of election, waiver and estoppel to defeat the right of a purchaser to rescind under s 9AE(1). The clear purpose and social policy underlying ss 9AA to 9AH of the Act is the protection of the section of the public comprising purchasers of lots in unregistered plans of subdivision. It would be inconsistent with that purpose and social policy to allow vendors to rely upon the conduct of purchasers as depriving them of their unqualified right to rescind under s 9AE(1)".[at 98] This conclusion was supported by s. 14(3) of the Act which provides that "(a)ny agreement whereby a person purports to waive any right which he may have under this Act to avoid a contract shall be void and of no effect". His Honour was supported by the approach of Doyle CJ in dissent in *Astill v South Esplanade Developments Pty Ltd* (2007) 249 LSJS 334; (2007) ANZ ConvR 534; [2007] SASC 231; BC200704966 which he preferred to the majority (and see, also *Tudor Developments Pty Ltd v Makeig* (2008) 72 NSWLR 624; [2008] NSWCA 263; BC200809204 where the NSW Court of Appeal (Basten JA, Beazley JA agreeing) also preferred Doyle CJ's approach in *Astill* at [66], [69]).

Clifford & Anor v Solid Investments Australia Pty Ltd:

16. In *Clifford*, which was also a case concerning the sale of units “off the plan” in a multiple-story residential development this time in Geelong, Bongiorno J adopted Hargrave J’s reasoning and conclusion that the doctrines of election, waiver and estoppel did not apply to a purchaser who sought to rescind under s. 9AE(1) *Sale of Land Act*. It appears that at least in Victoria this vexed issue has been put to rest. Bongiorno J held that this reasoning must also apply to s. 9AE(2). The dispute came before the Court by originating motion under s. 49(1) *Property Law Act 1958* – a vendor/purchaser summons – the parties seeking answers to specific questions arising out of a contract for the sale of land and declaratory relief (S. 49(2) deals with the Court’s discretionary power to order the return of deposits in any action for the return of a deposit). The contracts were dated 31 July, 2006. Each of the contracts in question was conditional upon registration of the relevant plan of subdivision. Each contract also gave the purchaser the right to avoid the contract if the plan was not registered on or prior to “the Plan Registration Date” — a date defined as being “the date that is 30 months after the Date of Sale”. The contract also provided for the Plan Registration Date to be extended. The clause was in a common form in such contracts:

If registration of the Plan of Subdivision is, or in the opinion of the Vendor, is likely to be delayed as a result of any one or more of the following events:

- a) delay by any Authorities or by a building practitioner (as defined under the Building Act) in providing any necessary approvals or consents in connection with the Development, notwithstanding the Vendor having taken reasonable steps to obtain such approvals or consent;*
- b) conditions or requirements imposed by any Authorities or by a building practitioner or by legislation in connection with any part of the Development;*
- c) strikes or lock-outs by any person employed in connection with the Development, or shortage of supply of materials or services to be used in the Development;*
- d) riots, civil commotion, burglary, theft or malicious damage;*
- e) any act of God, fire, flood, storm, tempest, lightning (sic), earthquake, explosion or inclement weather;*

the Plan Registration Date may be extended by such a period as the Vendor may reasonably determine from time to time. The Vendor must notify the

Purchaser in writing of such extension to the Plan Registration Date as soon as possible.

17. On three separate occasions, over a period of almost 8 months over and above the 30 month period in the contract, the vendor's solicitors, purporting to act under this clause gave notice to the purchasers that the vendor had extended the Plan Registration Date.
18. The purchaser's solicitors gave a notice of rescission dated 27 March, 2009, asserting that clause 4.4 was ineffective to permit the extension of the Plan Registration Date in the manner contemplated by its terms because of s 9AE of the Sale of Land Act.
19. His Honour agreed holding that clause 4.4 was not permitted by s. 9AE(2). His Honour stated at [20] that "section 9AE is clear in its terms. If the parties to a prescribed contract wish to stipulate a period other than the statutory period provided by that section, that other period must be specified in the contract itself. Once so specified, it cannot be subsequently changed, so as to bind the purchaser, by any agreement between the parties, nor can it be changed by the application of any other provision of the contract itself which results in a new application date, such as cl 4.4 in this case... (T)he only period specified in these contracts for the purposes of s 9AE is the period of 30 months referred to in the definition of the Plan Registration Date in cl 1.1(a) of the contracts".

Whittlesea City Council v Abbatangelo:

20. A recent case of the Victorian Court of Appeal in *Whittlesea City Council v Abbatangelo* [2009] VSCA 188 which has now been reported as (2009) 259

ALR 56 comprehensively sets out the principles which apply to cases where a person alleges that he or she has acquired title to land by adverse possession. The adverse possessor was successful before the trial judge (Pagone J) and again on appeal (Ashley JA, Redlich JA and Kyrrou AJA).

21. The Court noted the relevant statutory provisions as:
 - (a) s. 8 of the *Limitation of Actions Act 1958* (VIC) (the Act) which provides that no action shall be brought by any person to recover any land after the expiration of 15 years from the date on which the right of action accrued;
 - (b) s. 18 which provides that at the expiration of that period, the person's title to the land shall be extinguished;
 - (c) s. 9(1) which refers to when the right of action accrues, being the date upon which the person whose title stands to be extinguished "has ... been dispossessed or discontinued his possession"; and
 - (d) s. 14(1) providing that "[n]o right of action to recover land shall be deemed to accrue unless the land is in possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as 'adverse possession')".

22. The Court of Appeal referred to the summary of relevant principles by Ashley J in *Bayport Industries Pty Ltd v Watson* (2006) V ConvR 54-709; [2002] VSC 206; BC200203874 adding or highlighting further principles at paragraphs [5] and [6] of the Reasons. Practitioners are referred to the full and comprehensive discussion of legal principles which appears there.

23. Claims of adverse possession cannot now be brought against Council land by virtue of s. 7B *Limitations of Actions Act*. The Plaintiff in this case evidently brought her claim before this provision commenced on 26 November, 2004 or at least 12 months thereafter (s. 7B(2)(a) proceedings must be commenced by 26 November, 2004 or 12 months thereafter).

24. At trial, Mrs Abbatangelo relied upon the following acts as establishing adverse possession of the land from the time her family commenced residing on her family's property (at [48]):
- (a) installation of the gate;
 - (b) maintenance of fences on the boundaries of the land, including the southern boundary fence, without seeking financial contribution from the Council;
 - (c) use of the land for grazing, shade, shelter and at times enclosure of the variety of animals kept by the Abbatangelos from approximately 1960;
 - (d) installation of the bathtub trough (to provide water for stock, not piped);
 - (e) maintenance of trees and vegetation, including mowing of grass, and removal of noxious weeds and pests — foxes, snakes and rabbits;
 - (f) the clearing of fallen timber and maintenance of a fire break;
 - (g) the expending of money, and the provision of labour, to carry out the various kinds of work on the land;
 - (h) the holding, from the 1960s, of occasional barbeques and social gatherings on the land;
 - (i) the playing by Mrs Abbatangelo's children, grandchildren and extended family on the land;
 - (j) the construction of children's swings and a rudimentary cubbyhouse-like structure on the land;
 - (k) the removal of the fence on the eastern boundary of the land in approximately 1986; and
 - (l) use of the land for sporting and recreational activities such as horse riding, archery, football, horse training, rabbit shooting, bike riding, paddock bomb' driving and cricket.

Evidently much of this evidence which was disputed by the Council was accepted by the trial judge finding they were "truthful witnesses giving evidence as accurately as they could about the matters as they could recall them" (at [59] and see [115]).

25. Significantly as well, as the Court noted at [12] "(i)n November 1958, Mrs Abbatangelo and her husband bought the property abutting the western, northern and eastern boundaries of the land. That is, the respondent's property enclosed the land on three of its four sides, the exception being the southern boundary which abutted Bridge Inn Rd. To the east and west of the land, the respondent's property also fronted that road. The respondent's

property, which was under the Torrens system, comprised just under five acres". The block itself was only ½ an acre (at [8]) but was very valuable (at [107]).

26. The Council had rigorously, defended the Plaintiff's claim at trial and, prosecuted its appeal. The Court of Appeal fully explored each appeal ground and examined all the facts. It endorsed the distinguishing of *Traykof v Shanco Holdings Pty Ltd* [2001] VSCA 56 by the trial judge. The Court of Appeal dismissed all the criticisms of the trial judge's judgment by the Council and found that no appellable errors had been made.

Investec Bank (Australia) Limited v Glodale Pty Ltd & Ors:

27. In the recent case of *Investec Bank (Australia) Limited v Glodale Pty Ltd & Ors* [2009] VSCA 97; (2009) 256 ALR 104; [2009] V ConvR 54, the Court of Appeal considered the duty of a mortgagee to sell at market value or at the best price reasonable ascertainable in the circumstances under s. 85 *Property Law Act* 1958 (Vic.) and s. 420A(1) *Corporations Act* 2001 (Cth.). The Court dismissed the appeal holding that the Bank had failed to discharge its duty of care by not hiring a local estate agent and by using an inadequate marketing report (at [67]). The case contains a useful summary of the relevant principles.

28. Reference may also be made to:
- (a) *Boyarsky v Taylor* [2008] NSWSC 1415; [2009] NSW Conv R 56 (cf *Luu v Sovereign Developments Pty Ltd* (2006) NSW Conv R 56 and *Iannello v Sharpe* (2006) 69 NSWLR 452) whether vendor can recover instalment of deposit: a penalty? Also, whether a vendor could be

denied specific performance because the purchaser was unable to find finance to complete the purchase;

- (b) whether unsigned email sufficient for Statute of Frauds: *J Pereira Fernandes SA v Mehta* [2006] 1 WLR 1543 (no it does not, but see in Victoria, *Electronic Transactions (Victoria) Act 2000* (Vic));
- (c) relying on a mere puff: *Mitchell v Valherie* (2005) 93 SASR 76 (“nothing to spend – perfect presentation” – plaintiff successful at the trial but not on appeal as mere puff);
- (d) co-ownership – in what circumstances are co-owners in breach: *PCM Nominee (No 2) Pty Ltd v Brighton Bay Developments Pty Ltd* [2006] VSC 351 (per Whelan J)(which explores the incidents of co-ownership);
- (e) severing a joint tenancy: *McCoy v Estate of Caelli* [2008] NSWSC 986 (which held that in order for one joint tenant to sever a joint tenancy by transfer to him/herself the transfer must be registered);
- (f) landlord estopped from enforcing breach of covenant against making alteration: *Byron Bay Retirement Village v Zandata Pty Ltd* [2008] NSWSC 1121 (a case which is effectively the reverse of *Tabcorp*).

(Practitioners are referred to the helpful “Conveyancing and Property” section of *Australian Law Journal Online* (ed. P. Butt), where these cases were noted and where other significant recent cases in the field can be viewed.)

C. THE GAIC:

29. A proposal for a Growth Areas Infrastructure Contribution (GAIC) was introduced by the Victorian Government as part of Melbourne 2030 planning policy framework in 2002. As part of this policy, Melbourne’s Urban Growth Boundary (UGB) was established, and five growth areas were identified

(being Casey-Cardinia, Hume, Melton-Caroline Springs, Whittlesea and Wyndham). According to the GAIC Information Sheet (produced by the Growth Areas Authority established under Part 3AAB *Planning & Environment Act 1987*), December, 2008 and a supplementary sheet May, 2009)(available at www.gaa.vic.gov.au) a GAIC of \$80,000 per hectare will be applied to land which was brought into Melbourne's UGB in 2005. For land brought into the UGB in or after 2009 a flat rate charge of \$95,000 per hectare will apply. Land inside the UGB before 2005 will not have a GAIC imposed. An informative Fact Sheet in respect of the GAIC is available at www.dse.vic.gov.au.

30. The GAIC will be incurred on the first relevant property transaction usually the sale or subdivision of the land and is payable only once. Subsequent transactions will not attract a further contribution. Only land zoned for development (normally Urban Growth Zone) is liable for the GAIC. Land not zoned development will not attract the GAIC. The GAIC will be indexed annually from 1 July, 2010. The GAIC will not apply:
- (a) where the property is less than 0.4 ha in area (which is equivalent to the old 1 acre lot) or where planning permits for urban development of the property have been granted before 2 December, 2008;
 - (b) where land is transferred to a family member as part of an inheritance after a death in the family, or between family members (as long as the land is not subdivided);
 - (c) if land is subdivided to create a lot for the purposes of excising an existing dwelling on a lot.
31. It is estimated that the GAIC will cover only cover an estimated 15% of the cost of providing the required infrastructure (*The Age*, 9 September, 2009,

“Urban growth to cost \$11b” by Jason Dowling). The GAIC legislation is still with the draftsman and has not as yet been introduced into parliament.

D. **CONCLUSION**

32. The recent High Court cases of *Tabcorp*, *Gumland* and *Koompahtoo* have augmented the common law of Australia in the area of property and contract law. In Victoria we have seen two important decisions under the pre-selling provisions of the *Sale of Land Act* (*Everest* and *Clifford*), as well as significant decisions in the law of adverse possession (*Abbatangelo*) and the mortgagee’s duty in exercising its power of sale (*Investec*). The introduction of the controversial GAIC is presently in hiatus, but practitioners should bear the proposed legislation in mind when advising clients, and should ‘watch this space’ for news on the policy becoming law.

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