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September 2010

Legislative amendment may reduce claims against professionals

By Mark Brookes, Partner

It is hoped new legislation designed to simplify real estate sales will reduce the prospect of claims against solicitors, real estate agents, valuers and financial institutions.

Introduction

Particularly as a result of the so called 'credit crunch' and 'global financial crisis', there has been an increase in litigation against professionals involved in the property market – solicitors, valuers, real estate agents and financial institutions – where buyers have been able to terminate contracts for technical breaches of relevant legislation, notwithstanding the motive for termination usually solely relates to falling property prices or the availability of finance.

The purpose of the *Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010* (the Bill) is to simplify the processes for delivery and presentation of contracts for the sale of residential property, without compromising consumer protection provisions afforded by the warning statement (currently a Form 30c) and cooling-off period. The Bill is also said to promote greater certainty in residential property sales and restore a more equitable balance of buyer and seller rights.

The Bill was passed on 17 August 2010, and will come into effect on 1 October 2010.[1] The Bill is aimed predominantly at amending the provisions set out in Chapter 11 of the *Property Agents and Motor Dealers Act 2000* (PAMDA) which is often defined as "complex, prescriptive and difficult to comply with".[2]

Currently, Chapter 11 of PAMDA permits a buyer to terminate a contract for non-compliance of delivery methods and for minor technical breaches.

Key Amendments to the Bill

According to sections 365, 366A and 366B of PAMDA, a seller or seller's agent is required to deliver to the buyer a copy of the warning statement, body corporate and community management information sheet (for a unit sale) and the proposed relevant contract in a strict order. If documents were not "attached" in the order required under the sections, the buyer would be entitled to terminate the contract at any stage before settlement.

Although the requirement to attach a warning statement and information sheet (for a unit sale) to the proposed residential contract has remained unchanged, the Bill has relaxed the strict, prescriptive measures of presenting and delivering settlement documents through the implementation of section 364 that allows for the documents to be "attached in a secure way" to the proposed relevant contract (in any order) so that they "appear as a single document".[3]

Previously, buyers could also rely on "technical breaches" to terminate a contract for failure to present and deliver documents in the correct order. This was regardless of whether the buyer had suffered any material detriment as a result of the breach and despite the fact they were previously drawn to the warning statement and made fully aware of their rights and consequences of entering the proposed relevant contract by the seller or seller's agent. A common example being the delivery of a contract via facsimile ahead of the warning statement.

To prevent a buyer from terminating their residential real estate contract on the basis of a technical breach, the Bill states that if the documents are delivered by electronic communication, they are to be given electronically "as near as possible to the same time having regard to the normal operation of fax machines".[4]

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Current legislation requires a seller to attach a warning statement and give a direction to the buyer, "each and every time" a new version of the proposed relevant contract is delivered to a buyer. In addition, a seller or its agent is required to give buyers a clear statement drawing their attention to the warning statement (or information sheet if applicable) on 2 or more occasions depending on the number of counter-offers made.

Similarly, section 368A of the Bill requires a seller or their agent to give a prospective buyer a clear statement to the buyer, either verbally or in writing, directing them to the warning statement or information sheet (if applicable) at the time the contract is given to the buyer. However, the seller is only required to give the buyer notice once, at the outset, provided the relevant residential property and parties remain the same. This facilitates negotiations by eliminating the need to provide further directions to a seller and re-sign the warning statement with each new negotiation that is different to the proposed relevant contract.

Failure to attach a warning statement or provide a buyer with a clear statement, directing their attention to the warning statement upon issuing them with the relevant contract will enable the purchaser to terminate the contract, and result in a fine of $20,000.[5] Under these provisions, the buyer has 90 days from the date of settlement to terminate the contract. Sellers are afforded a defence however under section 368B of the Bill where a seller notifies the proposed buyer of the failure to comply and withdraws the proposed relevant contract prior to it becoming a relevant contract.

The Bill also states that once the buyer has signed the warning statement, prior to the contract, it is acknowledged that they have read and understood the contents contained within the warning statement, therefore eliminating the need for 'buyer's acknowledgement' documents.

Cooling off period

Section 364 of PAMDA states that a cooling off period commences 5 days from the date the buyer is bound by the relevant contract (or if that day is not a business day, then the next business day) and ending at 5pm on the 5th business day.

Section 369 of the Bill intends to streamline this provision with other legislation and in accordance with the common law position by making the cooling off period applicable from the day the buyer "receives" a copy of the relevant contract from the seller. Upon execution of the contract, the buyer is regarded to have "received" the relevant contract and communicates acceptance of the offer to the seller. This provides the buyer with greater certainty as to when the cooling-off period commences.

Transitional period

Contracts that have been entered into though not settled at the commencement of the Bill are afforded the same rights as post-commencement buyers while pre amendment rights to terminate for "technical breaches" such as failure to observe the proscriptive order of delivery of the documents will cease on commencement. The purpose of this is to balance the rights of buyers and sellers more equally.

In addition to the amendments to PAMDA, parallel amendments have also been made to the *Body Corporate Community Management Act 1997* requiring information sheets to be "given to buyers of lots and proposed lots that are not residential property", inadvertently removing the same prescriptive requirements for delivery and presentation for the information sheet.

Conclusion

The *Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010* simplifies the current procedure for preparation and execution of residential sales contracts. Further, it reduces the possibility of buyers terminating residential real estate contracts on "technical grounds" whilst retaining certainty in the marketplace by maintaining the consumer protection provisions of Chapter 13 in PAMDA.

It remains to be seen the extent to which this will enable professionals involved in failed conveyancing transactions – usually solicitors, valuers, real estate agents and financial institutions – to avoid litigation and the effect of decisions such as *Hedley Commercial Property Services Pty Ltd V BRCP Oasis Land Pty Ltd* (2008) QSC 261, where Justice Fryberg ruled the buyer was able to terminate its contract on the basis that the seller failed to adequately direct the buyer's attention to the warning statement, despite evidence the buyer was aware of the warning.

[1] Honourable PJ Lawlor, Second Reading Speech, 24 March 2010.
[2] Explanatory Memorandum, *Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010* (Qld).
[3] *Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010*, s364(a).
[4] Ibid s364 (b).
[5] Ibid s368A (6) and s370.

Fail to disclose under PIPA at your peril

By Allison Bailey, Solicitor

- ***The Supreme Court has considered section 32 of the PIPA for the first time.***
- ***Defendant unable to rely on document in defence as a result of failing to disclose it in the PIPA phase.***
- ***Reinforces importance of proper disclosure during pre-court process.***

The Supreme Court of Queensland has recently considered the strictness of rules of disclosure under the *Personal Injuries Proceedings Act 2002* (Qld) ('the PIPA') in the matter of *Newson v Aust Scan Pty Ltd t/as IKEA Springwood*.[1]

In this case, the first defendant (IKEA Springwood) attempted to rely on a document referred to in its defence which it had failed to disclose during the PIPA phase of the claim. The document was described as a policy ensuring a safe system of work for persons such as the plaintiff. Although the document was in the possession of the first defendant's solicitor from around October 2007, it was not brought to the plaintiff's attention, despite the first defendant signing a certificate of readiness for the compulsory conference held in June 2009, until it was referred to in the first defendant's defence, which was filed in August 2009.

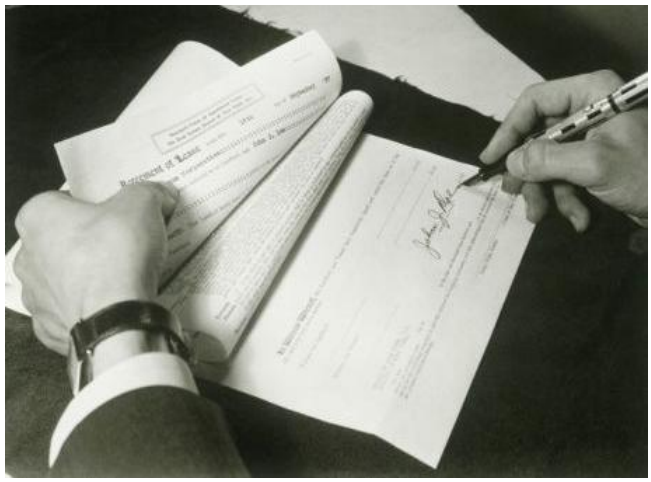
The duties of the first defendant to disclose documentation arise out of section 27 of the PIPA, which requires respondents to give the claimant copies of documents that are "directly relevant to a matter in issue". As a consequence of the first defendant's failure to disclose the document, pursuant to section 32 of the PIPA, the document could not be relied upon in the subsequent court proceeding unless the court ordered otherwise.

The court put the onus on the solicitor for the first defendant to demonstrate a reason why it should be excepted from the prohibition arising out of section 32 of the PIPA. The court concluded that non-compliance without reasonable excuse constitutes unprofessional conduct and noted the strong emphasis the PIPA places upon the obligation of disclosure.

The court concluded that it had a liberal discretion to allow a party to rely on a document despite its previous non-compliance with its disclosure obligations. One such instance where this was exercised was the matter of *Luck v Lusty EMS Pty Ltd*,[2] where all parties had signed a certificate of readiness but then sought to obtain expert medical evidence when proceedings were commenced. The court in that case concluded that this was an *"innocent but in the result mistaken certification of readiness for trial"* and was considered an instance where *"a solicitor might belatedly come to appreciate… that a particular type of specialist practitioner's views should have been obtained"*.

This situation was distinguished from the facts of the above case which involved an instance of innocent non-compliance where, despite reasonable diligence on the lawyer's part, it might only emerge afterwards that the certification of readiness for trial was not accurate.

In this case, the court determined that the solicitor for the first defendant failed to establish care and diligence in ensuring that disclosure was complete prior to signing a certificate of readiness. The solicitor provided evidence that a list of documents was compiled during the PIPA process prior to receipt of the document, but it was not included in any further lists after its receipt, despite the compulsory conference proceeding almost two years later. While the solicitor for the first defendant appears to have attempted to bear responsibility for the administrative error in an effort to avoid prejudice being suffered by the first defendant itself, the court did not find the explanation sufficient to warrant derogating from the rules of disclosure.



Although the court accepted that the plaintiff was unlikely to suffer material prejudice as a result of the first defendant's non-compliance, in consideration of the high importance the legislation was deemed to place on proper compliance and the clear, unexplained non-compliance by the first defendant's solicitor, the court refused the first defendant's application to rely on the document in its defence.

This is the first time the Queensland Supreme Court has considered section 32 of PIPA and its decision emphasises the importance of appropriately updating

disclosure throughout the pre-court life of a matter, especially prior to certifying that all steps and disclosure have been completed so the matter is ready for trial. The court appears to have used the circumstances of the first defendant's non-compliance to demonstrate the obligation of all parties to genuinely take all required steps prior to providing a certificate of readiness and to enforce the consequences of failing to do so. As stated by the court, if the first defendant's failure was excused under the court's discretion in this instance, it is difficult to see when a court would not waive the non-compliance of a party, which would render the provisions of the PIPA so flexible as to have no force.

The first defendant was provided with an opportunity to re-plead its defence following the striking out of paragraphs which made reference to the excluded document. It is likely that the inability of the first defendant to rely on that document had an adverse impact on its prospects of defending liability. While it appears the court viewed the particular document as a minor aspect of the first defendant's overall defence in light of the question about the time of its creation, it is foreseeable that failure to disclose documents in the PIPA stage could have a substantial impact in certain situations.

In practice, it would be tactically beneficial to disclose documentation which is viewed as supportive of your client's claim. The documentation that will be relied upon should the matter proceed to trial is an important factor to keep in mind when running a matter in the pre-court phase.

This decision of the court therefore serves as a warning that parties' obligations under the PIPA are material and will be enforced and, as a result, protocols should be established by respondents to ensure the procedural steps required by the PIPA are complied with so that parties are able to put their best case forward should the matter not resolve at compulsory conference.

[1] *Newson v Aust Scan Pty Ltd t/a IKEA Springwood & Ors [2010] QSC 223.*
[2] *Luck v Lusty EMS Pty Ltd [2008] QSC 146.*

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