While it is still early in a new calendar year, it is important to remind solicitors of the risks that arise when a contract is made in one calendar year but settles, or is scheduled to settle, in a subsequent year; and, more broadly, the risks associated with implied terms.

A recent Lawcover claim

Recently, Lawcover dealt with a claim arising from the termination of a Contract for Sale of Land. Contracts for sale of a residential property were exchanged in March 2018 and provided for settlement in December 2018. At that time, the contract was varied to provide for settlement in February 2019. The purchaser did not complete and the vendor’s solicitor served a Notice of Termination. The purchaser asserted the notice amounted to a repudiation; accepted the repudiation and ended the contract; and sought the return of the deposit. The property was later re-sold at a lower price.

Section 52A of the Conveyancing Act 1919 (NSW) provided that the contract was deemed to contain certain prescribed terms, conditions and warranties. Those could not be excluded, modified or restricted unless specifically permitted by regulation.

Regulation 6 of the Conveyancing (Sale of Land) Regulation 2017 (the ‘Regulation’) makes provision for specific terms relating to land tax, which are implied into all sale contracts. Relevantly, where a contract was to complete on a day more than 14 days after exchange, regulation 6(1)(a)(ii) and clause 3 of Schedule 2 to the Regulation had the effect that a purchaser could not be compelled to complete earlier than 14 days after service of a ‘current Land Tax Certificate’. Regulation 6.2 of the Regulation defines a current Land Tax Certificate as one which is issued ‘in the year in which the contract is to be completed ...’.

In this particular claim, there was a current Land Tax Certificate annexed to the contract when it was exchanged. However, because of the definition of ‘current Land Tax Certificate’, once there was an agreement to extend the completion date to the following calendar year, the certificate was no longer ‘current’. Consequently, at the time the Notice of Termination was served, the purchaser could not be compelled to settle by reason of clause 3 in Schedule 2 of the Regulation and the service of the Notice amounted to an act of repudiation.

The solicitor’s (vendor) client lost rights that would otherwise have been available against the defaulting purchaser, including the ability to sue for the deficiency on resale that the vendor later sustained.

Statutory implied terms

While this claim was settled on commercial terms, the issue of (non-excludable) ‘statutory’ implied terms under the Act and Regulation (including but not restricted to relating to land tax), is of wider relevance.

Most solicitors are familiar with the necessity to annex certain documents to a sale contract – a requirement that also arises under section 52A. It is perhaps less widely appreciated that the Regulation also deems additional provisions to form part of sale contracts. These include the land tax provisions that gave rise to this claim; but also, provisions relating to, for example, off-the-plan contracts, and occupation certificates (for dwellings under construction).

A failure to comply with these implied terms, where applicable, may expose a vendor to the risk of termination and loss of rights – and this may in turn lead to a claim on the solicitor.

It is important that solicitors acting for vendors of residential properties ensure that:

- if they propose to ‘compel’ a purchaser to complete, that they check they have obtained and served a ‘current Land Tax Certificate’ before embarking on that course;
- they are generally familiar with the implied terms, conditions and warranties that arise under s 52A and the Regulation, to avoid other potential pitfalls that may arise, depending on the nature of the property being sold.

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