Quick cautionary tales for a better practice

Episode 79

Special condition, severe consequence

Does this special condition sound familiar?

'Should either party prior to completion die or become mentally ill, either party may rescind this contract...'

In Fussell and Hanrahan the impact of this special condition was brought into stark focus.

Mr Fussell agreed to buy an industrial property from Mr Lockrey under a contract with a five year delayed settlement. The contract included a number of key clauses including a life estate for the vendor over the house on the property, and a rescission clause of the kind often included as a special condition in contracts for sale of land in NSW.

Settlement was delayed as Mr Fussell's bank raised concerns about the registration of the life estate. Two days after the due date for settlement Mr Lockrey died. His executor relied on the special condition to rescind the contract.

Mr Fussell commenced proceedings against the solicitor who had drafted the contract alleging, among other things, that the solicitor did not advise him about the special condition relating to rescission on death, and that he should have advised him to negotiate for the clause to be removed or changed. Fortunately, in this instance the solicitor had a file note that supported his evidence that Mr Fussell was advised about the special condition. The Court did find that the solicitor breached his duty of care by not advising Mr Fussell to ask for the special condition to be changed or deleted, in circumstances where there was a 5 year settlement and it was known that Mr Lockrey was not in good health. Ultimately, however, the Court was not satisfied that Mr Lockrey would have agreed to change or delete the special condition.

- Even when you have seen a special condition many times before, it is important to turn your mind to whether it is appropriate for that condition to be in the contract in the circumstances of the particular transaction.
- Make sure your clients are informed of the risks and consequences associated with rescission clauses, particularly in transactions involving delayed settlements.
- As always, keep detailed contemporaneous file notes of advice given and instructions received.
- Ideally, confirm advice in writing, detailing contractual risks, special conditions, and unusual clauses, with a clear explanation of their practical effects.

I'm Elissa Baxter

Fussell v Hanrahan t/as Dignan & Hanrahan Solicitors [2024] NSWSC 1388

Fussell v Hanrahan [2025] NSWCA 173