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Cooling off and your rights – KKI Law Update Summer 2016/17 edition

***Cheng Lo and Eng Kiat Tan v Thomas John Russell* [2016] VSCA 323**

Kalus Kenny Intelex recently won a landmark property case in the Victorian Court of Appeal which demonstrates the pitfalls of applying everyday language to legislation.

Background

KKI acted for the purchasers under a contract of sale, Lo and Tan (**Purchasers**), who wished to exercise their right to terminate the contract during the "cooling off" period.

Section 31 of *Sale of Land Act 1962 (*the **Act**) prescribes that a purchaser who wishes to terminate during the "cooling off" period must serve a notice to the vendor *or his agent* within 3 clear business days after signing the contract.

Assuming the natural meaning of the phrase, vendor's "agent", the Purchasers gave their notice by e-mail to the Vendor's real estate agent.

Russell (the **Vendor**) refused to accept the termination or return the Purchasers' deposit, alleging that the real estate agent was not the "vendor's agent" under the Act. Given that the cooling off period had expired, the Purchasers only had that one chance to terminate within time.

As a result, proceedings were commenced in the Supreme Court of Victoria.

On 30 May 2016, at first instance the Supreme Court of Victoria found in favour of the Purchasers. The decision was then appealed by the Vendor to the Court of Appeal.

On appeal, the Victorian Court of Appeal considered whether the Purchaser erred in sending the notice to the Vendor's real estate agent and whether their notice to terminate was valid.

Decision

Ultimately, the Court of Appeal found that the vendor's "agent" as it is described in section 31 of the Act does *not* automatically include a vendor's real estate agent.

Fortunately for the Purchasers in this case, that wasn't the end of the matter.

As is often the case (but not always), the contract of sale was prepared at a time when the real estate agent was the primary point of contact for prospective purchasers, and so it was the real estate agent's details which were included:

(a) under the heading "vendor's agent" in the particulars to the contract of sale; and

(b) immediately following the "cooling off" notice in the contract.

Having regard to these matters, and to the fact that the Purchasers had no contact with any other agent acting for the Vendor right up to the date that they served the termination notice, the Court of Appeal found that a reasonable person in the Purchaser's shoes would understand the "vendor's agent" to also be the vendor's real estate agent.

Lessons

This case highlights the potential trap of mistaking seemingly analogous phrases like, "vendor's agent" and "real estate agent" under a contract of sale. It is a lesson for purchasers and vendors alike, to make sure that your understanding of the contract is what is in fact drafted.

It is also an important reminder when faced with highly time-sensitive matters like contractual cooling off periods to waste no time seeking the right advice. KKI's highly experienced property law team is available to our clients at short notice to deal with your time-sensitive transactions.

Lo and Tan were represented by Jennifer Rozea, a partner in KKI's dispute resolution team. If you'd like to know more please contact Jennifer:

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