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Drafting Special Conditions in Property Documents

PRESENTED TO THE BENDIGO LAW ASSOCIATION

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OVERVIEW

1. Refresh on principles of contract construction

Conveniently summarised by Delany J in *LEA Child Care Services v Development Learning Centre Rainbow Pty Ltd* [2020] VSC 787

2. In depth case study – a contract for the sale of land

Chatham v Coral Park Pre-Training & Breaking Pty Ltd [2020] VSC 814

3. Observations and some tips for success

Proper drafting (to avoid the problem) but also can be done if problem detected after the contract is executed?

PURPOSE

- 1. Give full and proper effect to your client's intended outcomes.**
- 2. Avoid the risk of dispute arising from ambiguity / uncertainty.**
- 3. Avoid potential claim for professional negligence.**

SOME KEY TAKEAWAYS

- Precedent 'General Conditions' usually exist for a reason – ensure you understand their genesis before purporting to alter their effect.
- Check all words/phrases (defined or not) and ensure consistency.
- If a term imports an obligation, ensure it can be objectively measured.
- Ensure the parties' 'common intention' is properly articulated and recorded.
- Keep in mind: deleted words/clauses which remain legible may be considered to construe otherwise ambiguous language within the contract.

CONSTRUCTION PRINCIPLES

- *LEA Child Care Services v Development Learning Centre Rainbow Pty Ltd* [2020] VSC 787
- *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7
- *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37
- *Victoria v Tatts Group Ltd* [2016] HCA 5
- *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12

OBJECTIVE INTENTIONS

- Terms of a commercial contract are to be understood **objectively**, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract.
- In a practical sense, this requires that the **reasonable businessperson** be placed in the position of the parties.
- It is from that perspective that the court considers the **circumstances surrounding the contract** and the **commercial purpose** and **objects to be achieved** by it.

TEXT, CONTEXT, PURPOSE

- It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations.
- What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.
- The rights and liabilities of parties under a provision of a contract are determined objectively, **by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.**

AMBIGUITY

- Ordinarily, the process of construction is possible by reference to the contract alone.
- Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) **cannot** be adduced to contradict its plain meaning.

EXTERNAL FACTORS

- Sometimes, recourse to events, circumstances and things external to the contract is necessary.
- It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating.
- It may be necessary in determining the proper construction where there is a constructional choice.

COMMERCIALITY

- A commercial contract is to be construed so as to facilitate it having a commercial result and to **avoid it making a commercial nonsense or working commercial inconvenience.**
- However, that does not permit an approach to construction so as to give a more balanced operation if an interpretation different to that dictated by the language were adopted.
- Courts are not authorised under the guise of construction to make a new contract for the parties at odds with the contract to which they have agreed.

DELETED WORDS / CLAUSES

- It is open to the court to take account of the words crossed out of the standard form as an aid to the proper construction of the clause.
- The deletions do not evidence a prior intent, which could have changed, but rather they **identify a matter which, on the face of the document, was rejected by both parties.**
- It is permissible to have recourse to words and clauses deleted from a standard form or common form agreement, but which remain legible on the face of the document, for the purposes of construing ambiguous language in the executed agreement.

CONSTRUCTION PRINCIPLES

How to interpret a contractual clause - key points in summary:

- Objective understanding of relevant clause by a reasonable business person.
- Meaning can be informed by the other clauses in the contract.
- Meaning can be informed by reference to the purpose of the contract.
- Struck-out or visibly amended words or phrases may be relevant.

CASE STUDY



Denistoun Park (Image: Jason Warren Racing)

BACKGROUND

Chatham v Coral Park Pre-Training & Breaking Pty Ltd [2020] VSC 814

- Racehorse breeding & training facility on 7 acres on Mornington Peninsula
 - **Vendor:** Coral Park Pre-Training & Breaking Pty Ltd
 - **Vendor's Agent:** Ms Sayers (RT Edgar)
 - **Vendor Solicitors:** Retained to draft Contract of Sale
 - **Controlling Mind & Occupier:** Jason Warren (Jason Warren Racing Stables)
 - **Licensees:** Mr Andrews & Ms McDonald
 - **Purchasers:** Ms Chatham & Mr Cunningham (Crestevia Lodge)
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TIMELINE

- 31 May 2017: Offer to purchase for \$4.1m rejected.
- 6 June 2017: Offer to purchase for \$4.5m rejected.
- 19 August 2017: Purchaser signs Contract of Sale for \$5.05m.
Paid 5% (\$252k) deposit, settlement 60 days.
- 21 August 2017: Purchaser re-signs COS (to correct purchaser entity).
- 23 August 2017: Vendor signs COS.
- 19 October 2017: Settlement deferred due to Purchaser finance issues.
Further \$252k paid, released s.27 Sale of Land Act.
- 30 November 2017: Recission notice issued by Vendor.
- 12 December 2017: Purchaser inspects property.
- 13 December 2017: Purchaser terminates / Vendor terminates.
- 14 December 2017: Settlement aborted.

THE ISSUE

What were Vendor's obligations regarding 'vacant possession' at settlement?

Particulars of Sale:

- Purchaser entitled to vacant possession at settlement unless the words 'subject to lease' appear in this box, in which case refer to general condition 1.1.
- 'Subject to lease – refer to Special Condition 22.'
- If "subject to lease" then particulars of the lease are: 'Refer to Special Condition 22'.

General Condition 1.1:

- 'The purchaser buys the property subject to any lease referred to in the particulars of sale'.

THE LEASE PARTICULARS

22. Tenancies

22.1 The purchaser acknowledges and accepts that the property is currently tenanted on a “month to month” basis by Jason Warren Racing Stables Pty Ltd. No written tenancy agreement lease is available.

THE 'SUB-LEASES'

22.2 The purchaser acknowledges and accepts that parts of the property are sub-let by Jason Warren Racing Stables Pty Ltd on month to month tenancies (“the subtenancies”), the details of which are:

- (a) A dwelling to Amy McDonald at a current rental of \$400.00 per week;*
- (b) 8 Stables to Amy McDonald at current rental of \$10.00 per day per stable*
- (c) 16 stables of Trevor Andrews at a current rental of \$9.00 per day per stable;*
- (d) Office to Trevor Andrews at a current rental of \$650.00 per month; and*
- (e) Additional stables on an “required basis” to Trevor Andrews at a rental of \$9.00 per day per stable.*

THE 'SUB-LEASES'

22.3 If any of the current sub-tenants vacate the property prior to or at settlement, the Purchaser will accept the property with vacant possession of those sub-tenancies and not subject to lease. The Purchasers will make no claim against the Vendor, nor take any action or make any demands for or require compensation in the event that any or all of the sub-tenants vacate the property prior to or at settlement.

22.4 The Purchaser acknowledges that no written agreement or Lease is available with respect to any of the sub-tenancies.

22.3 The Purchaser must provide any or all (as the case may be) of the sub-tenants with at least sixty days' notice, in writing, of its requirement for determination of the sub-tenancies and vacant possession to be provided of any parts of the property which are sub-let.

WHOLE AGREEMENT (SC 3)

- (a) the Purchaser acknowledges that the Vendor's Agent (if any) has acted only as the Agent of the Vendor and no information representation or warranty of the Vendor or its Agent was made with the intention or knowledge that it would be relied upon and that no such information representation or warranty has in fact been relied upon and it is further agreed that this Contract of Sale and the original Vendor's Statement (a copy of which is included in this Contract of Sale) are the sole and full repository of the agreement between the Vendor, its Agent, and the Purchaser;*
- (b) it is hereby agreed between the parties hereto that there are no conditions, warranties or other terms affecting the sale other than those embodied herein and the Purchaser shall not be entitled to rely on any representations made by the Vendor or its agents except such as are made concerning this Contract.*

SEVERABILITY (SC 4)

In the event of any part of this Contract being or becoming void or unenforceable or being illegal then that part shall be severed from this Contract to the extent that all other parts shall not be or become void or unenforceable or illegal but shall remain in full force and effect and shall be unaffected by such severance.

GOING CONCERN (GC 13.5)

If the particulars of sale specify that the supply made under this contract is a 'going concern':

...

(c) the vendor warrants that the vendor will carry on the going concern until the date of the supply.

STATEMENT OF ADJUSTMENTS

- Prepared in December 2017 by the Purchaser's solicitor.
- Based on information provided by the Vendor's solicitor.
- Relevant period commenced on the first day of the month.
- Rent payable was \$4,000 per month.

THE LEGAL CLAIMS

1. Purchaser's title only subject to licensees under SC 22, not the Lease.
2. If SC 22 precluded vacant possession, contract should be rectified for common mistake.
3. Vendor's agent represented (prior to Purchasers signing COS) that Vendor would provide vacant possession at settlement.
4. Section 32 Statement did not fully disclose encumbrances, in breach of s.32(2) *Sale of Land Act*.
5. Failure to give vacant possession / withdraw rescission notice = repudiation.
6. Entitlement to rescission under s.32K *Sale of Land Act*.
7. Damages under s.236 *Australian Consumer Law* (misleading & deceptive).
8. Return of deposit under s.49(2) *Property Law Act* (statutory discretion).

FINDINGS

- Clause 22.1 construction – Purchaser’s title is subject to the Lease.
- In August 2017, the Vendor’s Agent told the Purchaser (on instructions) that JWRS would be vacating the property prior to settlement.
- Common *understanding* (cf. intention) that JWRS would vacate prior to settlement.
- Absence of rental amount = clause 22.1 incomplete, uncertain and void.
- Clause 22.1 is capable of being severed from the COS.
- Purchaser relied on representations re vacant possession to enter into COS.
- Purchaser did not have sufficient funds to complete settlement on 14 Dec 17.
- No evidence that Vendor has suffered loss due to failure of transaction.

DECISION

- No 'common intention' therefore no entitlement to rectification.
- Reliance on representation, but Purchaser not RW&A to complete = no loss.
- Vendor required to disclose rental payable in s.32 Statement.
- Vendor adduced no evidence to discharge onus it acted honestly and reasonably.
- Purchaser entitled to rescind under s.32K(2) & have deposit returned.
- Discretion under s.49(2) PLA to return deposit - misleading and deceptive conduct of Vendor which induced Purchaser to enter into COS.
- Position in Victoria whether vendor is required to disclose details of lease in s.32 Statement is 'a little unsettled'.
- S.32 obligations = consumer protection – construe in favour of purchaser.
- Very rare for discretion to be exercised under s.49(2) PLA to refund deposit.

DRAFTING TIPS

- Think about the **structure** of the document. This may become important for interpreting how the clauses are intended to operate together.
- **Definitions** – be consistent and precise.
- Consider **deleting or amending GCs** if they conflict with proposed Special Conditions (but only after understanding the intended purpose of the GC!).
- Be very clear and very precise about any **restrictions** (inc. details of leases and licences) in s.32 Statements and sale of land contracts.
- Carefully consider the ‘**going concern**’ provision and how the parties intend to give effect to it.
- Focus on understanding and giving effect to the parties’ **common** intention.

AFTER CONTRACT IS SIGNED

- Don't assume you can rely on the 'entire agreement' clause.
- Be wary about representations that are made after contract signing – these may become relevant in a number of different contexts.
- Check and reconcile information provided for Statement of Adjustments with COS terms and client's understanding.
- In some limited circumstances the purchaser's deposit can be refunded.

KEY TAKEAWAYS

- Precedent 'General Conditions' usually exist for a reason – ensure you understand their genesis before purporting to alter their effect.
- Check all words/phrases (defined or not) and ensure consistency.
- If a term imports an obligation, ensure it can be objectively measured.
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QUESTIONS?

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