



Précis Paper

Reasonableness and the Prevention Principle in property transactions

A discussion about some of the issues which arose in the recent decision of *Mediratta v Clark* (2019) VSC 685 including the prevention principle and the boundaries of the obligations established in *Mackay v Dick*.

Discussion Includes

- Background/Facts
- General Condition 22
- Clause 12 in the standard NSW Contract
- History of General Condition 22
- What does 'reasonable' mean?
- Implied term of good faith or reasonableness
- Duty of good faith
- Nominees
- What can practitioners include in contracts to address these problems?
- Implied right
- Limitations of *Mackay v Dick*
- Unconscionable conduct
- The default notice

Précis Paper

Reasonableness and the Prevention Principle in property transactions

1. In this edition of BenchTV, Christopher Wood SC (Barrister, 13 Wentworth Chambers, Sydney) and Timothy Messer (Barrister, Owen Dixon Chambers West, Melbourne) discuss some of the issues which arose in the recent decision of *Mediratta v Clark* (2019) VSC 685 including the prevention principle and the boundaries of the obligations established in *Mackay v Dick*.

Background/Facts

2. The case of *Mediratta v Clark* (2019) VSC 685 arose out of the sale and purchase of residential real estate in Melbourne. In April 2017 the parties entered into a Contract of sale for \$700,000.
3. Settlement was fixed at the 30th June 2018, well over a year from the date of contract. However, the 20th June 2018 was a Saturday and so in accordance with general conditions in the contract the actual date for settlement was fixed for the next business day which was the following Monday, being the 2nd July, 2018.
4. Settlement did not take place on 2 July, 2018 and the vendor gave a notice of default under the contract.
5. The purchaser resisted rescission in accordance with the default notice on the basis that at the time it was given, the vendor was in breach of the contract. Specifically, the purchaser claimed that the vendor was in breach of general condition 22 of the contract which created a right of inspection of the premises as well as an implied term that the purchaser contended gave rise to a right to inspect the property for the purposes of obtaining finance.
6. The parties fell into dispute and the matter became the subject of litigation commenced by the purchaser. The purchaser sought three things;
 - a. A declaration that the purchaser had breached the contract just prior to settlement by failing or refusing to permit an inspection by the purchaser or more particular, by the purchaser's valuer;
 - b. A declaration that the vendor had breached the contract by failing, in breach of the implied term, to permit the valuer to inspect the property and
 - c. A declaration that the default notice should be set aside.

General Condition 22

7. General condition 22 of the contract provides, under the heading 'inspection', that the purchaser may inspect the property at any reasonable time during the seven days preceding and including the settlement day.
8. The purchaser alleged that this provision provided them with right to inspect, at any time prior to settlement, either in person or by its nominee, in this case its valuer.
9. The purchaser relied on general provision 22 in seeking to contend that the vendor was in breach of its obligations under the contract, thus disentitling it from rescinding the contract.
10. The argument was that the vendor, in refusing access to the property by the valuer, had created the very circumstances in which the default arose and therefore, by operation of the so-called prevention principle, could not take advantage of its own misdeed to achieve a rescission of the contract.
11. However, an imperative point in this case was that the contract in this case was unconditional, that is that it was not made subject to finance.

Clause 12 in the standard NSW Contract

12. Clause 12 in the standard NSW contract provides that the vendor must do everything reasonable to enable the purchaser to have the property inspected for the purposes that include obtaining a report, including a valuation report.
13. In this condition it places the obligation on the vendor to do everything reasonable which is slightly different to the general condition of the Victorian contract which stipulates that the vendor must allow inspection at any reasonable time.

History of General Condition 22

14. In Victoria, the standard contract of sale was changed in 2008 and before that time, the contract of sale in standard form were prescribed by the *Estate Agents (Contracts) Regulations 1997* (Vic). It had the effect that the standard core contract for the sale of real estate in Victoria incorporated terms by reference to Table A of the 7th Schedule of the *Transfer of Land Act 1958* (Vic).
15. The relevant clause in Table A was clause 15, which was the old clause which was the antecedent to General Condition 22. This clause operated as a standard boilerplate clause in every contract of sale in Victoria unless specifically modified.
16. It read that the purchaser shall assume liability for compliance with any notices or orders relating to property sold which are made or issued on or after the date of sale, but the purchaser shall be entitled to enter onto the property sold at any time prior to the settlement date for the purpose of complying with any such notice or order which requires to be complied with before the settlement date. The purchaser may also inspect

the condition of the property and the chattels at any reasonable time during the period of seven days preceding the settlement date.

17. In 2008, it was decided that rather than having the boilerplate in a statutory provision, that wasn't included in the contract, it should be brought into the contract. As a result, Table A became redundant and all its provisions were rewritten and set out in the actual body of the contract that was signed by the purchaser and the vendor.
18. General Condition 22 picks up the last sentence of condition 15 of Table A with the added stipulation that the inspection of the property may be made by a person authorised by the purchaser. The argument in this case was that the right of inspection condition was plainly for the benefit of the purchase who was ready, willing and able to settle on the settlement date. It was not a right that was meant to be exercised months in advance so that finance could be obtained, it was simply a right to inspect the property to ensure that all was in order so that settlement might proceed.
19. This argument was accepted by Associate Justice Derham, that is that this attempt to invoke general provision 22 didn't meet the facts of the case because what the purchaser was seeking was an inspection by the valuer on the settlement date and so plainly was not in a position to settle.

What does 'reasonable' mean?

20. The overriding argument in this case turned on whether or not this condition availed the purchaser in circumstances where they had apparently taken no steps to arrange finance ahead of time and there was simply no evidence to suggest that the purchaser had done anything of the sort.
21. The Court held that that was reasonable and that it was not unreasonable of the vendor to say no to permitting that because of necessity that means the purchaser wouldn't settle in accordance with the contract.
22. Using terms such as 'reasonable' and 'unreasonable' come up in the drafting of contracts quite often but create fairly significant ambiguity. This case highlights the difficulty in trying to say with any precision whether there is a right to, for example, terminate the contract for breach, when the condition you need to meet is so subjective in its content.
23. As a matter of drafting, any steps that you can take to agree on a contract that doesn't involve such subjective criteria as reasonableness is to the advantage of certainty and makes it much easier for lawyers to advise on whether one is or is not in breach by, for example, refusing access to a valuer
24. At the extreme end of the spectrum, a contract may include an agreement to agree, and typically these will be unlikely to be upheld as enforceable

Implied term of good faith or reasonableness

25. Implied terms were an important part of the reasoning of Associate Justice Derham in this case. The case of *Mackay v Dick* (1881) 6 App. Cas. 251 was mentioned by Justice Derham in his decision.
26. *Mackay v Dick* creates the well-known duty that any party to a contract is under an implied obligation to do all such things as are reasonably required on the part of the party to give the other party the benefit of the contract. The ambit of the duty is however limited.
27. It is closely allied to the prevention principle, that is the principle that you cannot take advantage of a breach that your conduct has engineered.
28. The purchaser argued that it was necessary for the vendor to permit access to the property by a valuer appointed by the purchaser, where absent that inspection the purchaser could not obtain finance and absent the finance, it could not complete the purchase and therefore lose the benefit of the contract. There was an attempt made to construct the *Mackay v Dick* argument that in preventing access by a valuer, the vendor was in breach of its duty to do those things that were reasonably necessary on its part to permit the purchaser to have the benefit of the contract
29. That argument was rejected by Associate Justice Derham as this was an unconditional contract. It would have been a different situation had the contract been subject to finance.

Duty of good faith

30. One of the points that sometimes gets a run, often where a party does not find any assistance in the written contract is to fall back on the duty of fair dealing or good faith. However, the duty has a reasonably narrow operation and possibly only operates in the area of commercial dealings.
31. In this case, if the duty of good faith could have been implied into the contract, it probably would not have assisted the purchaser as it has been expressed to be a narrow right in performing obligations or exercising rights
32. The matter of *Australian Co-Operative Foods Ltd v Norco Co-Operative Ltd* (1999) NSWSC 274 as well as other authorities, have recognised that none of these duties require a party to subordinate their interests to the interest of the other person and so often the person who is falling back on these implied terms is really trying to mount an argument that the other party to the agreement should have helped and did not.

Nominees

33. Another aspect of this case was that the parties to the contract were the named parties in the litigation but the purchaser named in the contract had nominated a substitute purchaser to take the transfer of the property which brought into play a number of cases in Victoria.

34. The strong current of authority in Victoria is that the standard condition providing the purchaser with a right to nominate a substitute purchaser does not operate as a novation, it is simply a direction to the vendor to transfer the property at settlement to the named nominee. This has the consequence that the named nominee under a nomination, generally speaking acquires no contractual rights as there is no novation of contract and therefore no privity of contract between vendor and nominee.
35. Therefore, if a party does change their mind and decide that they want to have a different entity as the ultimate purchaser, without having to incur double stamp duty, then it might be appropriate to have either a formal novation or a replacement contract
36. In NSW, the practice is to have a replacement contract so that the new purchaser is inserted into a contract that then disposes of the earlier contract and the parties proceed to settlement as if that change had been made by an amendment.

What can practitioners include in contracts to address these problems?

37. The first thing to include would be a clause that meets the requirement of a purchaser requiring the assistance of a financier; if a practitioner knows that to be the case, then it is ordinarily prudent to include clauses that permit inspection by a valuer for the purposes of assisting with an application for finance.
38. If not, it leaves purchasers in that situation having to fall back on an implied right to have a valuer attend and inspect the premises before settlement

Implied right

39. The implied right to access to property under a contract for sale was explored in *Grubb v Toomey* [2003] TASSC 131 and *Grieve v Enge* [2006] QCA 213.
40. The decisions in both those cases was the effect that as part of the vendor's obligation to act reasonably to give the benefit of the contract to the purchaser the vendor was required to permit inspection of the property to a valuer so that finance could be obtained.
41. The important point that distinguished both those cases from the current case was that each of them was a conditional contract. Each contract was conditional upon loan approval and in those circumstances the judges had no trouble implying a term of the sort contended for.
42. The prudent course is to include a special condition that creates the right for the purchaser by a certain time so that there is no doubt that the purchaser is entitled to have the property inspected by a valuer of its choosing
43. The purchaser in this case, having left it to the 11th hour to try to send its valuer in has essentially backed themselves into a corner because they were forced at the hearing to

contend for an implied term that was unfairly wide and generous, that is to say an implied term to permit the valuer at any time.

44. Justice Derham noted that in accordance with *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, the implication of the term contended could not be satisfied in this case. The fact that there was a comprehensive written contract, an entire agreement clause and the fact that the contract was not subject to finance were all strongly against the implication of the term contended for.
45. In instances where the parties have taken the trouble to put into the contract comprehensive terms that deal with all the issues, particularly where those terms touch on the factual circumstance that is the subject of the implied term, then it is less likely that the court is going to imply some additional term
46. In *Khoury v Khouri* (2006) 66 NSWLR 241 it was said that in the context of written contracts for the sale of land, it is obvious to anyone with business experience, that something so important as the ownership of the family home should be written down and this has been the practice for centuries.
47. The Court therefore would be very slow to give effect to an agreement reached other than in writing for something so serious as a transaction for the sale of land.

Limitations of *MacKay v Dick*

48. Breach by one party does not automatically alleviate the other party of their obligations. That is that the contract stays on foot unless it is validly rescinded as highlighted in the decision *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25.
49. The question which arises is whether the contract imposes a duty to cooperate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done even if the consequences of the decision are to disentitle the other party to a benefit.
50. Further, there cannot be a duty to cooperate in bringing about something in which the contract does not require to happen

Unconscionable Conduct

51. In this case, it was said broadly that the conduct of the vendor in refusing access to the property to a valuer and then using that as the basis for the service of a default notice amounted to unconscionability. That argument was rejected by Associate Justice Derham.

The Default Notice

52. There was also a technical argument about the content of the default notice itself.

53. When the default arose, the vendor's solicitors served a default notice and it had a schedule in the usual way including a number of items. Item 6 of the schedule noted that the settlement date was to be 30 June 2018.
54. Item 7 of the schedule said that the default was the failure of the purchaser to complete the contract on 2 July
55. The purchaser argued that the notice was ambiguous on its face because of this. However, Associate Justice Derham rejected this argument and in so doing referred to *Robinson v Becata Pty Ltd* (2004) NSWSC 310.
56. A common theme runs through the cases concerning unilateral notices to do with the approach taken in construing the notices. In all of them an effective notice is one which conveys its message, whatever its message might be, clearly and distinctly to a reasonable reader in the position of the recipient of the notice and in particular having knowledge of the circumstances which surround the transaction in which the notice is given and the recipient has or ought to have
57. In this case, the purchaser knew that the fixed contract date was a Saturday, it knew that the contract provided in its general conditions that the deemed settlement date was the next business day. Therefore, a reasonable recipient would understand the dates referred to in the clauses in the default notice
58. The outcome was that the default notice was valid because it was to be construed in the context of the contract and the vendor validly terminated the contract pursuant to that notice.

BIOGRAPHY

Christopher Wood SC

Barrister, 13 Wentworth Chambers, Sydney

Mr Wood was admitted as a Solicitor in 1998 and admitted to the Bar in 2001. He specialises in bankruptcy and insolvency, commercial law, equity and trusts and intellectual property. He has a Bachelor's degree in science and an Honours degree in Law. Mr Wood is the co-author of *Equity, Practice and Precedents* (Thomson, Sydney, 2008) as well as several other publications. He is also a Member of the Society for Computers and the Law.

Timothy Messer

Barrister, Owen Dixon Chambers West, Melbourne

Mr Messer practices in the following areas of law – commercial, alternative dispute resolution, equity and trusts. He was admitted to practice in 1988 and first signed the Bar Roll in 1990.

REFERENCES

Legislation

Estate Agents (Contracts) Regulations 1997 (Vic)

Transfer of Land Act 1958 (Vic)

Cases

Mediratta v Clark (2019) VSC 685

Mackay v Dick (1881) 6 App. Cas. 251

Australian Co-Operative Foods Ltd v Norco Co-Operative Ltd (1999) NSWSC 274

Grubb v Toomey [2003] TASSC 131

Grieve v Enge [2006] QCA 213

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266

Khoury v Khouri (2006) 66 NSWLR 241

Automatic Fire Sprinklers Pty Ltd v Watson [1946] HCA 25

Robinson v Becata Pty Ltd (2004) NSWSC 310.