Cooling off? Don't just notify the real estate agent

Tan v Russell [2016] VSC 93

Stephen Teale & Grace Turner-Mobbs | June 2016 | Commercial Disputes & Transactions

Summary

Purchasers seeking to terminate a Contract of Sale of land during the statutory cooling-off period should take special care to ensure that the notice of termination has been provided to someone with the authority to receive it within the prescribed time period. Notice sent to non-authorised parties may not be effective to allow a purchaser to withdraw from a sale.

Background

On 4 April 2014, Messrs Tan and Lo purchased Mr Russell's property at private auction, between themselves and another prospective purchaser, for $4.48 million.[1] Messrs Tan and Lo signed the Contract of Sale (the Contract) and provided a cheque for $350,000 promising to pay the residual of the 10% deposit by the end of June 2014.

On 9 April 2014, Mr Tan contacted Mr Russell's real estate agent, Mr Gibbons, by email, text message and voicemail message, purporting to exercise the right to cool off within the cooling off period under section 31 of the *Sale of Land Act 1962* (Vic) (the Act) and terminate the Contract.

Section 31 of the Act provides that a purchaser may terminate the Contract of Sale at any time before the expiration of three clear business days after the signing of the contract, by giving notice to the vendor, his agent or by leaving it at the address for service specified in the Contract of Sale. Where the Contract of Sale has been effectively terminated, section 31 provides that the purchaser shall be entitled to the return of all monies paid under the contract, except for the sum of $100 or 0.2% of the purchase price, whichever is greater, which may be retained by the vendor.

Messrs Tan and Lo claimed the Contract had been effectively terminated during the cooling off period and sought:

- a declaration the Contract was terminated by them on 9 April 2014;
- the return of the $350,000 paid under the contract less 0.2% of the purchase price;
- damages; and
- interest and costs.

Mr Russell counterclaimed that service of the notice of termination had not been properly effected and sought:

- the residual of the deposit;
- the loss on resale;
- the costs incurred in respect of the resale; and
- interest and costs.

Decision

Her Honour Justice Cameron found that the Contract had not been effectively terminated, and Mr Russell's counterclaim must succeed.

Her Honour found that Mr Gibbons, the real estate agent, did not constitute Mr Russell's 'agent' for the purposes of section 31 of the Act as:

- merely being the vendor's real estate agent does not make the person the vendor's agent for the purposes of section 31;[2]
- Mr Russell did not "hold out" that Mr Gibbons was his agent,[3] consequently Mr Gibbons did not have the necessary authority to receive the notice of termination;[4]

- Mr Gibbons did not have any authority beyond the usual authority granted to a real estate agent by a client vendor i.e. to market and sell the property.[5]

Comment

In order for a purchaser to effectively exercise their right to terminate a Contract of Sale of land during the statutory cooling off period, a correctly drafted notice must be provided, within the period prescribed, to:

- the vendor;
- any person specified in the Contract of Sale as having the authority to receive service of notices; or
- by leaving the notice at the address for service specified in the Contract of Sale.

Failure to do so may mean that a purchaser will not have validly exercised their cooling off rights which could expose them to adverse financial consequences.

[1] Section 31(5) of the *Sale of Land Act 1962* (Vic) provides that the cooling off period does not apply to the sale of land where the sale is by publicly advertised auction.
[2] *Tan v Russell* [2016] VSC 93 at [35].
[3] Ibid at [53].
[4] Ibid at [64].
[5] Ibid at [61].

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