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## BUYER'S RIGHTS WHEN A SELLER CHANGES THEIR MIND

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Report by Despina Priala | Priala Legal | 7 September 2011

### Contract obligations

What do you do if you enter into a contract of sale as a buyer, and the seller changes their mind in wanting to sell the property to you?

Entering into a contract of sale to buy property is a very serious step to take by both buyer and seller. Each party must understand that if either one of them do not fulfill their contractual obligations under the contract of sale, this can have serious consequences for the party who fails to perform such obligations.

We need to look at, and consider, two possible scenarios: where the seller changes their mind before the seller is bound under a contract of sale, and where the seller may change their mind after the seller is bound.

#### Before parties are bound

If a seller changes their mind before they are bound under the contract of sale, usually the seller will be able to change their mind and walk away from the deal at that point. What does it mean to be "bound" under a contract of sale? The law of contract is of enormous complexity, therefore one must not provide a blanket statement as to what this means. Many factors are taken into account such as common law principles; how the contract was prepared, presented and signed by the parties; the form of communication adopted by the parties for entering into the contract of sale (for e.g. post, facsimile or email); and the applicable state law. Suffice to say, that the principles at common law of a valid contract, being offer, acceptance, consideration, and the intention to create legal relations, are of upmost importance in determining whether a contract is valid. As to when parties are bound will be subject to the relevant state legislation applicable to the transaction at hand.

#### After parties are bound

Once a contract of sale is signed by both buyer and seller, and becomes binding on them, there is a contractual obligation placed on both parties to fulfill the terms of the contract. This includes if the above situation occurs during any cooling off period.

For a buyer, this usually means paying the deposit on time, satisfying any conditions to the purchase of the property contained in in the contract of sale, and effecting settlement by paying the balance purchase price to the seller at settlement. For a seller, this usually means delivery of free and unencumbered title to the property at settlement including a transfer of the land, and providing vacant possession to the property.

If a seller changes their mind after the contract is formed between both buyer and seller, the law protects buyers who may be faced with this scenario.

Where the seller fails to perform their contractual obligations in failing to providing to the buyer, possession to the property and delivery of unencumbered title, the seller will be in default. In this situation, the buyer has Liability limited by a scheme approved under professional standards legislation.

certain rights available to it, which includes affirming the contract and seeking specific performance of the contract, (i.e. where the seller is forced to sell to the buyer) and/or suing the seller for damages. Alternatively, the buyer may terminate the contract of sale and sue the seller for a claim for damages for loss suffered as a result of the seller's default. This includes legal costs on an indemnity basis. The buyer will also be entitled to a refund of the deposit and any interest earned on such deposit.

### **Protection for the buyer**

A buyer perhaps can protect itself from the above situation by carrying out the following:

1. When parties are considering entering into a contract of sale, one of the most important aspects of this is to ensure that each party to the transaction is completely comfortable with the terms of the contract of sale, before signing the contract. Any problems that may have arisen should have been resolved in negotiations with the parties *prior* to entering into the contract. Whether as seller or buyer, it is always recommend you engage a solicitor to advise on the terms of the proposed contract before you sign any document committing to the purchase or sale. By following a process whereby each party confirms they are completely satisfied with the terms prior to signing, can be very useful in ensuring that a seller follows through on their commitment to selling the property to you. Obtain confirmation from the seller that they are completely satisfied with the terms of the contract prior to entering into the contract, as pointed out above. The conduct of the parties prior to entering into the contract may become very relevant in any litigation proceedings that ensue following a seller's breach of the contract.
2. Lodge a Settlement Notice over the title to the property. Sections 138 to 152 of the *Land Title Act 1994* (Qld) create a procedure for lodgement in the registry of titles of a settlement notice. A settlement notice, once entered, alerts all interested parties who search the Automated Titles System to the fact that an intended settlement is imminent or a settlement has occurred and lodgement of an instrument is imminent. Settlement Notices are of primary important where there is no duplicate certificate of title issued by the Registrar of Titles. The settlement notice operates for a period of 60 days from the date of lodgement. The settlement notice prevents the registration of any instrument over the title, except those instruments noted in the settlement notice. In other words, if a seller tries to sell the property to another buyer for a higher price, any documents that are lodged for registration over the title during this 60 day period will be rejected.
3. Lodge a Caveat over the title to the property. In Queensland, there are limited circumstances by which a person can lodge a caveat over title to the property. This can include buyers under contracts of sale. If the buyer suspects the seller may not follow through on their commitments to them, and may, for example, try to sell the property to another buyer for a higher price, the caveat will prevent any dealings with the property for a certain period of time, usually 3 months in Queensland. The caveat also acts notice to the world at large that the first buyer has an interest in the property which must be dealt with.
4. In situations where the seller has changed their mind which has resulted in leaving the buyer with nowhere to live, having the sale of the property from which they are moving contingent upon the completion of this sale from the seller.

### **Conclusion**

There are serious consequences for both buyer and seller if they fail to fulfill their obligations under a contract of sale. Parties should not enter into these transactions lightly and should always obtain legal advice prior to signing any legal documentation.

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