

Unobstructed Ocean Views: Consideration of Special Conditions

by Mitchell Beck, Senior Associate

The recent decision of the Supreme Court of Queensland in *Gilson v Flamingo Enterprises Pty Ltd* [2010] QSC 53 emphasises the importance of carefully considering the meaning and effect of special conditions in sale contracts.

Wendy Gilson (the buyer) approached the selling agent for Flamingo Enterprises Pty Ltd (the seller) to purchase a residential unit 'off the plan' on the Sunshine Coast. The buyer explained to the selling agent the only reason she was considering a purchase in this particular development was to get unobstructed ocean views. The buyer drafted a special condition and proposed its inclusion in the contract to which the seller agreed. The special condition stated only that, "The positioning of the unit must provide unobstructed ocean views". The buyer contended that the seller had breached the special condition and sought a declaration from the court that she was entitled to terminate the contract.

Justice Daubney had to consider whether the:

1. special condition was an essential term of the contract;
2. seller had breached that condition; and
3. buyer had a right to terminate the contract as a result of any breach by the seller.

Daubney J found that the condition had to be interpreted objectively:

*"The clear meaning of the clause is that, when constructed, one would have 'unobstructed ocean views' from the unit. That does not necessarily mean that one would have panoramic views of the ocean from every point within the unit. Such an interpretation would, in my view, be quite unreasonable. But the term 'unobstructed ocean views' means more than that one would have selected aspects of the ocean, depending on the direction in which one looks. The use of the word 'views' tends to suggest a wider range of vision than a single aspect. Those views must be of the ocean, and not merely visual slices of the ocean or the sky above the ocean. And those views of the ocean must be 'unobstructed'. That word really speaks for itself."*¹

The unit was constructed on the fourth floor on the eastern side of a complex one street back from the esplanade. The unit had a large balcony on the eastern side. Justice Daubney said when looking due east, "one looks across the top of a lowset brick building

directly to the east of the complex, and then across the esplanade and the beach protection zone to a vista of the ocean beyond."² He held this was undoubtedly an ocean view, however, there were some obstructions to the view. To the north east there were, "buildings between the complex and the esplanade [that] completely obstruct the view of the ocean."² To the south east, it was found, "the view of the ocean is significantly obstructed by the roof of a neighbouring apartment block."² Because of these obstructions, Justice Daubney said, "I do not consider that it can be objectively said that one has 'unobstructed ocean views' from this unit."³

The subject of the special condition was a matter of importance for the buyer – and that was communicated to the seller via the flow of negotiations and the inclusion of the special condition. The court held the special condition was an essential term of the contract and the seller had breached that special condition, allowing the buyer to terminate the contract.

Considering Justice Daubney's reasoning above – that "the word 'views' tends to suggest a wider range of vision than a single aspect" it is reasonable to suggest that, had the special condition referred to the word 'view' in its singular form only, the special condition may not have been breached. The case emphasises how it is essential for both sellers and buyers to carefully consider the meaning and effect of special conditions before inserting them into a contract of sale. The special condition in this case should have clearly stated whether it was to be an essential term of the contract and the criteria for determining whether the view was in fact 'unobstructed'.

¹at para 6

²at para 10

³at para 12

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