What is the issue the legislation is designed to fix?

BP7 Pty Ltd v Gavancorp Pty Ltd [2021] NSWSC 265

It is evidently to enable a piece of residential property from being hassled into a major financial commitment without the opportunity to first obtain proper legal advice.

That is why the section 66W process with the *Conveyancing Act 1919* (NSW) is available. A seller can elect to transact on the basis that the cool off is not available but only if the purchaser produces a certificate and a statement that the contract has been explained.

The same process applies for the basis of a purchaser when it enters into an option. This avoids the purchase handing over the option fee without initially having the benefit of legal advice.

But the signed certificate regarding the option requires the solicitor to certify that they have explained the option to the purchaser.

If the option was a put and call, the solicitor would be directed in his duty to the client if he did not explain the 'put' side of the transaction to the purchaser.

Therefore, the purchaser must have the put and call explained before entering the transaction (or at least have the ability to cool off).

22 June 2021

On a put and call option, the grantor cannot risk the grantees pulling out at exercise time, because of the section 66W chacha. That neuters the whole point of the put option, which is to have a mechanism by which the grantee is irreversibly bound and does not have an escape hatch.

So, the way around Darke J would be to get the section 66W certificate at the same time as the section 66ZF.

But doesn't that sound a little silly? It means you could have two different certificates at the same time, which in effect do the same thing.

Which they do certify that a solicitor as explained the offer of transaction, before the purchaser becomes irrevocably bound.

So, to get lost in semantics around whether the transaction should be characterised as a contract of sale or a contract of purchased is to fail to see the forest for the trees.

Section 66ZG - Option is void if it is exercisable within 42 days after it is granted.

Why?

To avoid the risk that the purchase to be in possession that he has to exercise too fast or risk losing his option fee. This gives him the assurance that he can completed all his searches before deciding whether or not to exercise.

Section 66ZI - If an option is granted and the contract and prescribed documents are not annexed, either party may rescind.

Parties can rescind from when the option was granted until the option ceases to be exercisable or, if relevant 5 Business Days after an option is exercised.

All of the option fee and deposit must be refunded.

Section 66ZF - A certificate referred to in section 662B or 66ZC complies with this section if it is signed (in effect) by a solicitor or barrister not acting for the vendor; and

(1)(d) *contains a statement to the effect that the solicitor or barrister explained to the purchaser the effect of the option and the proposed contract attached to the option, the nature of the certificate and the effect of giving the certificate to the vendor"'*

(Note, this does not say "option to purchase" but section 66ZB and 66ZC do)

Division 8 deals with the sale of land referring to a "contract for the sale of residential property"

Division 9 refers to “option for purchase of residential property”

It is this distinction on which # relies to hold that the section 66ZF Certificates was not effective, because a put option is not an ‘option to purchase’. Rather, it grants an option to sell.

As a matter of pure semantics this is no doubt the case, but also looks like a failure to see a forest for its trees.

An attractive analysis could say that when Division 9 was drafted, the drafts persons were only thinking about options to purchase. That is, the point of Division 9 was to protect the grantees of options (‘the purchaser’) in the same way that purchasers under contracts for the sale of land were protected under Division 8.

In that context, “contract for the sale of land” was used in Division 8, because that is the name emblazoned across the top of every contract for the sale and purchase of land in NSW.

Option to purchase was used in Division 9, on my argument, because the goggles were focused on protecting purchasers under options, in the same way as purchasers under contracts.

The point of protection was to let them both cool-off.

This seems to be evident from the way in which Division 9 mirrors Division 8. Both commence with definitions. Division 8 then includes a definition of ‘residential property’ which does not appear in Division 9 (because there is no need to duplicate the definition).

Division 8 contains section 66R, which is not replicated in Division 9. The provision requires vendors to have contracts available before advertising the property of sale.

If we look at headings:

Section 66T - No cooling off period in certain cases – matches section 66ZC

Section 66U - Cooling off rights - matches section 66ZD

Section 66V - Consequences of rescission - matches section 66ZE

Section 66W - Certificates - matches section 66ZF

No match section 66ZG

Section 66X - Contract to contain statement regarding cooling off period - matches section 66ZH

No match section 66ZI

No match section 66ZJ

Section 66Y - Operation of Division 8 – matches 66ZK

As to the provisions which do no match section 66ZG, this provides that the option is void if it is exercisable within 42 days after it is granted.

Honourable Mr Causley provided in his second reading speech on 21 November 1989 that the cooling off period is for the purpose of containing a 'rationalisation of the law of option'. The intention of the provisions was to extend existing ban on short-term options a been retained and extended to cover options that are exercisable in the 42-day period. This would enable solicitors and barristers acting for the party the necessary time to obtain relevant searches and certificates required to test the vendor warranties contained in the option.

Section 66ZI addresses the issue (not present in Division 8) that the option must annex a copy of the contract and section 52A prescribes dues (failure to comply confers on both parties the right to rescind).

Section 66ZJ deal with the formalities of notice under section 66ZH and 66ZJ.

The above analysis suggests that both divisions are concerned with the same thing, in slightly different circumstances.

Consideration of the provisions suggest that the thing with which the provisions are concerned is to protect purchasers and grantees from being irrevocably committed to significant financial obligations (i.e. the obligation to purchase a residential property or the risk of losing substantial call option fee which could (without proper pause or advice) lead to being locked into a purchase).

In both cases, the purchaser and grantees are accorded a statutory right to cool off. The only way to avoid the cooling off is for a solicitor to issue a section 66W certificate (contract for sale) or section 66ZF certificate (option to purchase).

In both cases the obligation imposed on the solicitor is to explain:

- the effect of the contract (s 66W)

- the effect of the option and the proposed contract (s 66ZF)

It is important to recognise that a put and call option necessarily includes the call and the put elements of the transaction. And the obligation of the solicitor in the section 66ZF certificate is to certify that the solicitor explained the effect of the option. This necessarily includes the 'put' risk.

After exercise, the put option is always effectively reverted.

If Darke is right, this means that when a put and call option is entered into, the vendor/grantor could avoid the risk by requiring both a section 66ZF certificate and a section 66W certificate.

But does this make sense? Why would the vendor need to require two separate certificates at the same time which both do the same thing?

Robert Speirs
Partner
+61 2 9248 3405
rspeirs@speirsryan.com.au

Speirs Ryan is a Sydney based boutique property law firm with national coverage. The firm is uniquely placed with specialist teams in both property transactions and strata law.

22 June 2021