CONTRACT LAW – WHEN WINNING IS NOT

The recent Supreme Court of New South Wales case *Fuentes* -v- *Bondi Beachside Pty Ltd* [2016] NSWSC531 handed down on 29th April 2016 is an example of litigation where both parties won but one party also lost.

In short the factual matrix is that the plaintiff in the proceedings (Fuentes) entered into a contract for the purchase of a unit in an apartment block that was yet to be constructed by the vendor, the defendant in the proceeding. The contract price was $1,420,000.

The contract provided what is a usual clause that the purchaser may not assign his or her interest in the contract unless he or she first obtains the vendor's prior written consent.

The purchaser without obtaining that consent sold the property to a third party for the sum of $1,550,000 which on the face of it is a profit of some $130,000 (excluding transaction costs and any duty that may be applicable). The vendor objected to the sale and terminated the contract by notice prior to completion.

The purchaser issued proceedings against the vendor for specific provisions of the contract and the vendor in reply counterclaimed for damages.

The Court held that the purchaser, pursuant to its obligations under the contract of sale was obliged to obtain the vendor's prior written consent to any sub-sale to a third party and in those circumstances was in breach of the contract of sale.

However, the Court also held that the breach was not a breach of an essential term nor a repudiation of the contract and therefore, ordered that the plaintiff was entitled to a specific performance namely that it be entitled to pay the vendor the sum of $1,420,000 and take a transfer of the property to enable the transfer to the third party purchaser.

The Court decided that the vendor however was entitled to nominal damages which it assessed at $20.00. The defendant having been awarded nominal damages will be somewhat distressed by paragraph 57 of the judgment which says as follows:

> *Prima facie* the defendant should pay the plaintiff's costs of the proceedings, including the cross-claim, notwithstanding the award of nominal damages. I will hear the parties on costs.

The lesson to be learned from this is that if the parties require a term to be construed as an essential term of the contract, then unless it can be shown that the breach is so serious as to deprive the innocent party of substantially the whole benefit it was intended to obtain from the contract then it will be treated as not being an essential term such that the breach will only give rights in damages. Those damages will have to be established at trial.

To put the issue beyond doubt in drafting a term of a contract that requires the consent of one of the parties then if that consent is to be an essential term then it should be specifically referred to in the contract as an essential term.

Further, the author of any such contract may insert as a recital or as a preface to that particular term the reasons why it is essential and seek an acknowledgement from all other parties that it is so. For instance, in this particular case the contract could have recited that:

A. *The vendor is constructing one or more units in the development of which this unit is but one.*

B. *It is essential to the vendor for the purpose of financing the development and for the smooth and efficient development and construction that the purchaser is not entitled to transfer, assign or part with the contract prior to settlement.*

then followed as a term:

(a) *The purchaser must not without the vendor's prior written consent transfer, assign or part with the purchaser's rights (if any) under the contract prior to settlement.*

(b) *The purchaser acknowledges that this restriction is to protect the legitimate interests of the vendor.*

(c) *Sub-clause (a) is an essential term of this contract.*

Of course all this is with the benefit of hindsight.