

Contracts for the Sale of Land: REIWA Subject to Finance Clause

The recent Supreme Court of Western Australia (Court of Appeal) decision in *Dodds v Kennedy* [No 2] [2011] WASCA 131 considered the standard REIWA Subject to Finance clause.

Real Estate Update

Key Principles

If a buyer nominates a Lender in the “finance clause is applicable” box of the REIWA Offer and Acceptance form, the buyer must submit an application for Finance Approval to that Lender.

If a buyer engages a mortgage broker, to satisfy the subject to finance clause the mortgage broker must submit an application for Finance Approval to the nominated Lender, even if the mortgage broker thinks the nominated Lender will not approve the loan.

When a buyer signs the “finance clause is applicable” box but a Lender is not nominated, then the Buyer must submit a Finance Application to an institution as described in sub paragraph (b) of the definition of “Lender” in the REIWA Offer and Acceptance form. Sub paragraph (b) of the definition of “Lender” only applies when a Lender is not nominated.

Background

Dodds (**Buyer**) and Kennedy (**Seller**) entered into a contract to purchase land using the REIWA standard Offer and Acceptance form (September 2006 Revision) with the standard Subject to Finance clause (**Contract**).

On the first page of the Contract, the box headed “Finance clause is not applicable” was struck out and the box headed “Finance clause is applicable” was completed showing the following information:

LENDER:	ANZ Bank
LATEST TIME: 4pm on:	21/4/08
AMOUNT OF LOAN :	\$667,500.00

Who does this affect?

Buyers of real estate and mortgage brokers.

Article Highlights

- For a buyer to comply with the subject to finance clause a mortgage broker must apply for finance to a lender even if finance approval is unlikely.
- Mortgage brokers may have a duty of care to explain to a buyer the consequences of not applying for finance.



On 9th April, 2008, the Buyer paid the deposit specified in the Contract and on the 11th April, 2008 met with a mortgage broker.

The mortgage broker was an intermediary, not a credit provider. The mortgage broker was entitled to submit loan applications to the ANZ, but was not entitled to approve loans on behalf of ANZ.

The mortgage broker advised the Buyer that it did not meet ANZ Bank's loan criteria. The Buyer accepted that advice and the Finance Application was not submitted to ANZ. The Buyer did not make any other applications for Finance Approval.

The Buyer did not obtain finance and failed to settle on the Settlement Date.

The Seller terminated the Contract and sued the Buyer for damages.

The Issue

Clause 1.1(a)(1) of the Contract stated that the Buyer *"must submit an application for Finance Approval to the Lender..."*.

The question to be determined by the Court was whether the Buyer had complied with clause 1.1(a)(1) of the Contract.

The answer to this question turned on the meaning of "Lender", which was defined in Contract as follows:

"Lender means:

1. *the lender or mortgage broker nominated in the Schedule; or*
2. *if the Buyer makes a finance application to, or if no lender is nominated in the Schedule then, any bank, building society, credit union or other institution which makes loans and in each case is carrying on business in Western Australia or a mortgage broker carrying on business in Western Australia."*

The Initial Decision

The trial judge held that:

1. an application for 'Finance Approval' must be made, directly or through an intermediary, to an entity with authority to approve the loan;
2. for an application to be made via an intermediary such as a mortgage broker, the mortgage broker must submit the application to an entity with authority to approve the loan;
3. the Buyer did not make an application for 'Finance Approval' to the ANZ or

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any lender and therefore had failed to comply with clause 1.1(a)(1); and

4. the Seller was entitled to the Buyer's deposit and damages from the Buyer.

The Appeal

The Buyer appealed the decision to the Supreme Court of Western Australia (Court of Appeal).

The Court of Appeal dismissed the Buyer's appeal and held that:

1. a Lender means a lending entity with the ability to issue an Approval Notice or a Non Approval Notice;
2. if a mortgage broker is appointed, for the Buyer to comply with the Contract the mortgage broker must make an application on behalf of the Buyer to obtain a loan from a Lender;
3. if the Buyer nominates a Lender in the Contract, then "Lender" means the nominated Lender (i.e. sub paragraph (a) of the definition of "Lender" applies); and

Two of the judges held that sub paragraph (b) of the definition of "Lender" is a default provision that is only activated when there is no nominated Lender.

Conclusion

The effect of the Supreme Court decision is that for a Buyer to comply with the standard subject to finance clause a mortgage broker must submit an application for Finance Approval to the buyer's nominated lender even if the mortgage broker believes the loan will not be approved.

The Court's decision will impact on the functions and responsibilities of mortgage brokers. Where a mortgage broker is not willing to make a finance application on behalf of a buyer because "finance approval" is unlikely, the mortgage broker may have a duty of care to explain to the buyer the consequence of failing to make the finance application.

The Supreme Court's decision also has practical implications for parties using the REIWA Offer and Acceptance Form. The Supreme Court was critical of the REIWA standard subject to finance clause describing it as "clumsy and ambiguous". Justice Pullin considered that the definition of 'Lender' in the clause should be interpreted by deleting the phrase "if the Buyer makes a finance application to, or" in paragraph (b). The definition of "Lender" is also confusing given that paragraph (a) refers to a mortgage broker that is an intermediary not an entity with authority to approve a loan. Therefore, if parties are using the standard subject to finance clause, consideration should be given to amending it as follows:

"Lender means:



the lender nominated in the Schedule; or

if no lender is nominated in the Schedule then, any bank, building society, credit union or other institution which makes loans and in each case is carrying on business in Western Australia.”

Importantly, this amendment does not prevent a Buyer from using a mortgage broker because a mortgage broker can still be engaged to source finance. But the mortgage broker should not be inserted as the “Lender” in the “Finance clause is applicable” box.

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