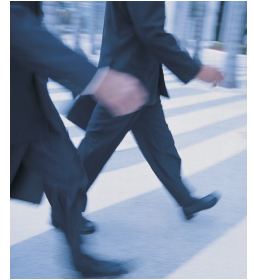


Property & Contract Law *Update*



Bank guarantees - restrictions on calling on them

Bank guarantees are commonly used to secure a tenants obligations in commercial leases and as security in a variety of other contracts, including construction contracts.

Until a recent court decision in NSW it was commonly accepted that the holder of a bank guarantee cannot be prevented from calling on a bank guarantee as long as they do so in good faith.

This is no longer the case, at least in NSW, following *Universal Publishers Pty Ltd v Australian Executor Trustees Ltd* [2013] NSWSC 2021 where the court rejected the good faith test and decided that the tenant had a right to contest the landlord's right to call on the bank guarantee until the court decided whether or not a breach of the lease had occurred.

Assuming *Universal Publishers* is followed in the Northern Territory landlords and other holders of bank guarantees as to security need to take some care on the drafting of clauses in relation to bank

guarantees so that it is expressly agreed if , acting in good faith, the security holder believes that a breach has occurred they are entitled to call of the bank guarantee.



Land developments agreements - stamp duty pitfalls

In *Commissioner of State Revenue v Lend Lease Development Pty Ltd* [2014] HCA 51 the High Court determined that for stamp duty purposes the consideration for purchase of the subject land included a range of payments required under a development agreement in addition to the land purchase price under the land sale contract.

The case related to whether payments by Lend Lease to Victorian Urban Development Authority (VicUrban) under a development agreement in relation to the Docklands development in Melbourne were part of the dutiable consideration for purchase of the land. The payments included payments for infrastructure in the area to be constructed by VicUrban; a proportion of sale proceeds expected to be realised by Lend Lease; estimated remediation and public artworks costs; and the value of certain development works to be carried out by Lend Lease.

The relevant provision in the Victorian stamp duty legislation giving rise to the litigation is brief and required the court to determine what was “the consideration ... for the dutiable transaction ...”. The High Court decided that the consideration for the transaction is “the money of value passing which moves the conveyance or transfer”.

The High Court characterised the land purchase and development as a single, integrated and indivisible transaction, and found that all relevant payments under consideration were part of the dutiable transaction. VicUrban would not have conveyed the land to Lend Lease without the payments, and as the payments were part of a single integrated transaction they could not be for some other separate purpose such as the ongoing development of the land.

The decision leads to some complexity in the area of land purchases with associated development agreements, particularly agreements between private developers and government agencies where development covenants are common. Careful consideration of the stamp duty implications in relation to land purchases with any associated development conditions is recommended.