

Short notes on

WHAT YOU SHOULD KNOW ABOUT SUSPENSIVE CONDITIONS IN SALES OF IMMOVABLE PROPERTY

Introduction

In many cases, sales of immovable property are subject to conditions relating to bond financing or the sale of another property. These are conditions precedents to the sale.

In the recent appeal court case of *McGrane v Cape Royale The Residence (Pty) Ltd* (831/2020) [2021] ZASCA 139 (6 October 2021), the issue concerns the interpretation of an agreement of sale of immovable property. In particular, it examines whether the Agreement had been rendered unenforceable by the non-fulfilment of a condition precedent.

As a result, the claim instituted for specific performance was dismissed with costs on 14 April 2020 in the Western Cape High Court.

Facts of the matter

In November 2006, the parties entered into a written agreement of sale (the Agreement). The appellant purchased, and the respondent sold a unit yet to be built in a sectional title development. Commonly known as section 215 of the sectional title scheme 'Cape Royale' situated at Green Point, Cape Town (the property).

In October 2007, the parties concluded a written addendum to the Agreement regarding the floor area. The appendix did not change anything in the original Agreement except for the purchase price.

In January 2013, the appellant alleged that he had complied with all of his obligations under the Agreement. Accordingly, he paid the deposit and the remainder of the purchase price to the respondent's transferring attorneys.

At the heart of the dispute between the parties are clauses 5.1 and 5.2 of the Agreement. The parties differ in the interpretation of these clauses. They provide (quoted verbatim):

'5.1 In the event of the Purchaser requiring a mortgage loan to finance the acquisition of the Unit and Exclusive Use Area, this sale shall be subject to the condition precedent that the Purchaser obtains approval in principle from a recognised financial institution for such a loan in the amount as specified in Clause 6.1 of the Schedule within 21 (twenty-one) days of signature hereof by the Purchaser, on the institution's usual terms and conditions relating to such loans. The Purchaser undertakes to use his best endeavours to ensure that the loan referred to is granted timeously and undertakes to sign all such documentation and co-operate with the Seller fully in order to ensure that the said loan is approved. This condition shall be deemed fulfilled upon the Purchaser obtaining approval in principle from a financial institution for a loan as herein contemplated.

5.2 In the event that the condition precedent is not fulfilled within the time period provided for in clause 5.1 above, the Seller may in its sole discretion extend this period for 7 (seven) days at a time until the Seller, in its absolute discretion, notifies the Purchaser of the termination of such time period.'

Clause 6 of the schedule referred to above in clause 5.1 of the standard terms and conditions provides:

'6. MORTGAGE BOND

6.1 Amount required: R649,480

Date by when to be granted: Within 21 days after the date of acceptance of this Agreement by the Seller, or such extended period as the Seller in its sole discretion may allow.'

There are, therefore, two issues:

1. The first and primary issue is whether the Agreement, correctly interpreted, was subject to a condition precedent that was not fulfilled.
2. The second is whether the Agreement survived despite the condition precedent remaining unfulfilled (in the circumstances where the waiver was not pleaded).

A proper reading of clause 5.1 reveals that it is prefixed by the words' *[i]n the event of the Purchaser requiring a mortgage loan to finance the acquisition of the Unit . . . this sale shall be subject to the condition precedent . . .'* (Emphasis added). From the language of the text, the structural and grammatical construction, including the punctuation of the whole clause, it is self-sufficiently clear

that the parties did not expressly provide that the appellant, as Purchaser, was obliged to obtain the mortgage loan. This is undoubtedly not what clause 5.1 says.

In *Mia v DLJ Properties*,¹ the court stated that:

'Furthermore, since the suspensive condition was inserted to protect the Purchaser in the event of his not being able to raise the purchase price without obtaining a bond over the purchased property, the parties obviously intended that, if the Purchaser chose to make provision for the delivery of the guarantees without obtaining such a bond, he would be free to do so. The parties could accordingly not have intended that the Purchaser would be obliged to apply for the bond and that, if he failed to apply therefor, he would thereby breach the contract.'

Therefore, it is clear that, from the onset, the appellant did not require a bond or loan to affect the purchase price in due course, and the parties accepted this. Accordingly, the condition precedent embodied in clause 5.1 of the Agreement created an obligation on the appellant only if he required a bond or a loan.

Therefore, as a result of the fact that the appellant's evidence remained uncontroverted that he paid the total purchase price in cash, clause 5.1 had no application, and the appellant waived its benefits.

The finding of the high court that the condition precedent did apply to the Agreement. Further, that the appellant failed to fulfil such a condition that rendered the Agreement unenforceable was flawed.

Conclusion

The court found in favour of the buyer. Therefore, suspensive conditions should be carefully considered to establish whether or not the intent was to compel compliance or provide an option.

Therefore, this appeal court case serves to reinforce the fact that the parties' intent should be considered and recorded appropriately. Contact an attorney at SchoemanLaw for all your property law and litigious needs.

¹ (*Waltloo*) (*Pty*) *Ltd and Another* 2000 (4) SA 220 (T) at 222.