

Trade Practices - Commercial Property - Gazumping - Not Misleading or Deceptive Conduct

Walker Corporation Limited & Anor v Australia NID Pty Limited & Ors, 95 ATPR 41-430.

The practice of gazumping is common in a rapidly rising real estate market. The Sydney residential market has seen periods in recent years where gazumping has been a financially attractive option for vendors.

The actual term refers to the practice where a vendor who has orally agreed to sell his property to a purchaser accepts a second and higher offer from a third party.

Legislative Change

In the period between the oral agreement to sell property and the actual exchange of contracts neither a vendor nor a purchaser is bound to enter a contract for the sale of the property. It is in this period that gazumping takes place.

Three attempts have been made to deal with the problem of gazumping through legislation. In each case the legislation aimed to decrease the period of time between an oral agreement to sell and the actual exchange of contracts. These legislative enactments only applied to transactions involving residential properties.

The most recent attempt involved the enactment of the *Conveyancing (Sale of Land) Amendment Act 1990* (NSW). This *Act* requires that the contract for sale of residential property must be available for inspection by the purchaser when the property is offered for sale. In this way the period between an oral deal to sell and the date of exchange of contracts should be reduced and the risk of gazumping by the vendor should also decrease.

Walker Corporation Case

An attempt was recently made by a purchaser to seek redress under s.52 of the *Trade Practices Act* against a vendor that had gazumped it on a contract for sale of commercial property. In *Walker Corporation Limited & Anor v Australia NID Pty Limited & Ors*, the Full Federal Court held that the practice of gazumping will not usually be misleading or deceptive conduct and therefore not a breach of s.52 of the *Trade Practices Act*.

The case was a classic gazumping scenario. Australia NID Pty Limited ("NID") had placed property on the market and had entered into negotiations for sale of the property with Walker Corporation Limited and Walker Consolidated Investments Pty Limited ("the Walker Companies"). The parties made an oral agreement on 2 April 1993 to exchange the contracts without delay. However, the contracts were not exchanged without delay and on 14 April 1993 NID received another offer from a

third party to purchase the property at a higher price. On 16 April 1993 NID exchanged contracts with the third party.

The Walker Companies argued that NID had engaged in misleading or deceptive conduct by failing to inform them that, from 14 April 1993 onwards, NID was considering an offer from a third party. The court held that, because the parties had agreed not to be bound until the agreement was in writing, NID was justified in selling the property to a third party and NID had not misled or deceived the Walker Companies by not following through with the oral deal.

The case is a warning to buyers of property in a rising market. Section 52 does not make an oral deal with respect to the sale of real estate the equivalent of a written instrument or part performance. The section cannot be relied upon to prevent a vendor from selling to a third party after having made an oral deal with another.

- **Duncan Hall, Solicitor, Corporate Services Group, Abbott Tout Solicitors.**
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