



## RESIDENTIAL PROPERTY FINANCE CLAUSES

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Property agents and developers would be aware the standard REIQ Contract contains a finance clause which makes the contract conditional upon the buyer obtaining finance. This is for the mutual protection of the parties, in that either party may elect to terminate the contract should the condition not be satisfied.

Despite this, a common fear exists among sellers that the inclusion of a finance clause may offer buyers an excuse to terminate a contract if they no longer wish to proceed. Whilst it is true a buyer may terminate a contract if they fail to obtain finance by the approval date, a buyer is required to take all reasonable steps to obtain finance and must demonstrate substantial evidence in support of same. This requirement is construed strictly by the courts.

Recent examples of this include the Queensland Court of Appeal decision of *Hauff & Anor v Miller* [2013] QCA 46 and the decision of the Queensland District Court in *Habi Pty Ltd v Global Enterprises Pty Ltd* [2013] QDC 55.

### HAUFF & ANOR V MILLER [2013] QCA 48

The unanimous decision of *Hauff & Anor v Miller* [2013] QCA 48 has confirmed that where a buyer attempts to terminate a contract on the grounds of failure to obtain finance, evidence must be provided that all reasonable steps were taken to secure finance by the finance date.

The Court found that a failure to take such reasonable steps amounts to a breach of contract and activates the seller's right to affirm or terminate the contract.

### BACKGROUND

On 3 September 2010 the parties entered into a REIQ contract for the sale of a residential lot under community titles schemes. The contract was subject to the buyer obtaining finance in the amount \$400,000 from the nominated financier, ING Bank, by 10 September 2010.

Prior to entering the contract the buyer obtained pre-approval for the loan from the ING Bank. However, upon signing the contract the ING Bank notified the buyer that a new loan application would be required.

Given the looming finance date, the broker advised the buyer that it would not be possible to obtain a suitable

loan from ING Bank and that they should seek finance from The Rock Building Society.

When approval was not obtained, the buyer, following an approach on behalf of the seller, agreed to extend on the finance date to 17 September 2010.

The buyer sent a notice to the seller that she was unable to obtain finance, and claimed the contract was at an end.

The seller sought to enforce its rights under clause 9 of the contract, namely to resume possession of the property, keep the deposit and interest earned on its investment, sue the buyer for damages and resell the property.

### DECISION

Chief Justice de Jersey firstly considered whether the buyer had taken 'all reasonable steps' to obtain finance. Given the buyer had not even submitted an application with the nominated financier the Chief Justice was firm in finding that the buyer 'did not instigate the process required of her'.

### IMPLICATIONS

The decision in *Hauff & Anor v Miller* confirms that failure to take all reasonable steps to comply with the finance provision will allow the seller to affirm or terminate the contract, and activate their remedies in the event of 'Buyer's Default'.

Buyers should be aware that noncompliance with the finance clause, by failing to take all reasonable steps to obtain finance, can give the seller significant remedies under the contract.

### HABI PTY LTD V GLOBAL GROUP ENTERPRISES PTY LTD [2013] QDC 55

The Court's decision in *Habi Pty Ltd v Global Group Enterprises Pty Ltd* highlights the importance of using precise language when specifying the date for finance approval and settlement. The dispute arose as a result of careless drafting and ultimately caused the parties to become confused as to whether finance approval was the date the buyer received approval notification or the actual date of approval.

BACKGROUND

On 6 November 2012, the buyer and seller entered into a contract for the sale of land. The finance date was “21 days from the contract date” and settlement date for the contract was “within 14 days of finance approval”. The term “finance approval” was not defined.

The seller believed settlement was to occur on 11 December 2012 and failed to settle on the settlement date four days earlier.

Given the seller’s alleged breach, by repudiation of its obligations under the contract, the buyer accepted the seller’s repudiation and elected to terminate the contract.

Additionally, the buyer requested the return of its deposit, and commenced proceedings to sue the seller for damages.

IMPLICATIONS

The decision in *Habi Pty Ltd v Global Group Enterprises Pty Ltd* offers a warning to all parties and solicitors to ensure that finance clauses are drafted with sufficient certainty.

Additionally, the case reinforces the need for parties to seek clarification and agreement as to the date for settlement of a contract

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