



JHK LEGAL

Vacant possession and the residential buyer

February 15, 2019

Written by JHK Legal Senior Associate Alison De Marco, Accredited Specialist Business Law (Qld)



We highly recommend a buyer organise a pre-settlement inspection of the property. A number of issues may come to a buyer's attention during a pre-settlement inspection including:

- the property is a mess, has not been cleaned and there is rubbish all over the place;
- the seller has left personal property in the house, garden or shed;
- there is a tenant in the property that does not intend to vacate.

When such issues arise buyers commonly believe they are entitled to either terminate the contract or delay settlement until the issues are resolved. However, it may come as a surprise that most of these issues will not entitle a buyer to terminate or delay settlement. This is because, even with such issues, technically the seller is still able to give “vacant possession” under the contract.

1. What is vacant possession

The REIQ Contract for Houses and Residential Land (15th Edition) (**REIQ Contract**) [at clause 5.5] requires that “On the Settlement Date, in exchange for the Balance Purchase Price, the Seller must give the Buyer vacant possession of the Land and the Improvements except for the Tenancies”.

The term “vacant possession” includes the absence of any impediment, physical or legal, which interferes with the purchaser's contractual right, whether express or implied, to immediate “unimpeded physical enjoyment” of the property. The obligation of a seller to give “vacant

possession” is not absolute and questions of breach must be judged as a matter of substance¹. In other words, it depends on the circumstances and facts of each case.

2. Rubbish Left on the Property

Generally speaking, an obligation to give vacant possession requires a seller to remove any goods (chattels) not included in the sale of property before settlement, including “rubbish” extraneous to the sale (unless the buyer has consented to such items being abandoned or left on the land permanently²).

However, in the case of *Nelson v Bellamy* (2000) NSWSC 182, the seller left the following items on the property: a large wooden pallet, 3 wooden brick pallets, a quantity of concrete bricks, a quantity of boards for flooring, 20-30 pieces of timber off cuts, a large circular pole, broken concrete blocks, loose dried cement, builder’s rubble, 11 shutters for French doors and other items left underneath the property.

Despite the significant number of items left behind, and the fact that the removal of such items would require at least two people, the use of a truck, shovel and wheelbarrow for an entire day, the Supreme Court of NSW decided that the items did not constitute a “substantial impediment” and the buyer was not entitled to terminate the contract for failure to provide vacant possession. The court³ accepted the seller’s submission that “*such items did not impinge at all on the living areas, including the courtyard, and did not substantially prevent use of the undercroft or the side alleys which did not, in any event, constitute, relevantly, “a substantial part of the property”*”.

Practical Tip:

If there is significant rubbish on the property at the time of the initial inspection, we highly recommend a special condition be inserted in the contract, **before the parties sign the contract**, requiring the seller to remove any such rubbish (and if necessary clean the property) before settlement.

3. Personal Property Left on the Property

The courts have considered that the failure of a seller to remove personal items (in this case “Reserved Items” named under the contract) did not constitute a substantial breach of contract⁴. Here, the court considered that a term in the contract requiring the seller to remove certain items before settlement was not “essential” to the bargain, and therefore the seller was able to give vacant possession despite the fact that the personal (or in this case the named “Reserved Items”) were not removed from the property prior to settlement.

Practical Tip:

If there are personal items on the property that a buyer wants to ensure are removed prior to settlement (for example, cubby houses, trampolines, wood and other building materials) we again recommend a special condition be inserted in the contract expressly requiring the seller to remove such items prior to settlement, and if not done, allowing the buyer to delay settlement or receive a

¹ *Smilie Pty Ltd v Bruce*(1998) 9 BPR [97750]at 16,725 (1999) ANZ Conv R 412 at 414.

² Skapinker and Lane, para [13.20], p 436.

³ at [29]

⁴ *Davidson and Anor v Bucknell and Ors* [2009] QCA 383

deduction from the balance purchase price at settlement equivalent to the cost of having the items removed. Nothing spurs on a Seller to do the right thing than to realise they won't get their money if they don't comply! It is important to note that including the items as "Excluded Fixtures" in the contract will not be sufficient as illustrated in the case above.

4. The Property is Not Clean

A property left in an unclean state at settlement will not generally be considered a "vacant possession" issue. Rather, it relates to whether the seller has breached a warranty under the contract. Here, we are referring to the general "state" or "condition" of the property at settlement (a separate issue to rubbish left on the property) and whether a buyer can delay settlement or terminate the contract because of same.

There is no standard condition in the REIQ Contract requiring a seller to hand over a property in a clean and tidy condition. As such, generally a seller will only be required to hand the property over in a similar state/condition (fair wear and tear excepted) as it was at the time the parties signed the contract⁵. Therefore, if the property was unclean or untidy as at the contract date there will be no requirement on a seller to have the property cleaned (professionally or otherwise) unless a special condition is included in the contract requiring same.

Practical Tip:

If a buyer wants to ensure a property is handed over in a clean and tidy state, we recommend a special condition be inserted in the contract to that effect.

5. Tenants Have Not Vacated

If a tenancy is listed on a contract the property is sold subject to that existing tenancy (and vacant possession will not be provided at settlement). Even if the "ending date of term" of the lease has passed the property will be sold subject to a "periodic tenancy" and vacant possession will not be required at settlement.

However, if a tenancy is not listed on the contract, the property will not be sold subject to that tenancy (and vacant possession will be required at settlement). In such circumstances, the seller must give the appropriate notice to vacate to the tenant and the tenant should vacate the property before settlement. If insufficient notice is given to the tenant and the tenant has not vacated the property, or the tenant refuses to vacate the property, by settlement, the Buyer may be able to terminate the contract (as the seller is unable to provide to the buyer vacant possession at settlement).

Practical Tip:

A buyer that requires vacant possession at settlement should proceed with caution if an existing tenancy is noted on a contract (or if the buyer is aware that the property is currently tenanted). In many circumstances termination will not be the best option for a buyer and a buyer will need to consider what arrangements may be suitable to them if settlement is delayed because a tenant has not vacated by the settlement date.

⁵ See Standard clause 8.3(1) of the REIQ Contract

In this instance, a buyer should discuss their concerns with a solicitor **before signing the contract** and ensure a suitable special condition is included in the contract to adequately protect the buyer's interests if the tenant has not vacated by the settlement date.

Getting Proper Advice Can Help you avoid these issues

Generally, unless an essential term of a contract, a Buyer's only remedy for a seller's failure to provide "vacant possession" at settlement is to seek damages after the fact. Practically speaking, pursuing damages after settlement is often difficult, timely and costly to a buyer.

Carefully drafted contract terms can alleviate many of the above circumstances and ensure that such issues are dealt with efficiently and without contention at settlement. A carefully drafted special condition will allow a buyer to delay settlement (or receive a deduction from the purchase price at settlement) if this is not done. If a contract does not contain a special condition to this effect a buyer will generally be forced to settle if the seller can otherwise provide vacant possession of the property. While it is then open to a buyer to attempt to claim damages after settlement this often proves difficult and costly to the buyer.

Before signing a contract, a buyer should ensure they first consult a properly qualified solicitor to advise them of their rights under the contract, discuss any potential issues with respect to same and negotiate and draft suitable special conditions to best protect the buyer.

JHK Legal has solicitors who are experts in property law and can assist buyers to ensure that their purchase progresses as smoothly as possible.