Submission No 28

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

Organisation:

Name: Mr Michael Blay

Telephone:

Date Received: 8/11/2006

8 November 2006

Ms Victoria Pymm
Standing Committee on Law and Justice
lawandjustice@parliament.nsw.gov.au

Dear Ms Pymm

Re: Unfair terms in consumer contracts

I read of your committee's current enquiry on this subject only at the weekend and so was unable to meet the 11 October deadline for submissions. However, the contract term the subject of my submission is so unreasonable, unnecessary and mischievous and affects so many people that I hope your committee can somehow take account of it and recommend steps that will eventually result in it being removed from all present and future contracts.

The term and the objections to it appear from the attached letter that I wrote to the NSW Real Estate Institute. No rebuttal of my objections was given and I was merely advised, after telephoning to enquire, that some minor amendments could be made but there would be no substantial amendments.

While there is legislation allowing courts to overcome the effects of harsh and unfair contract terms in some circumstances and it is possible to argue that the clause should be read down by the court by reason of the surrounding circumstances, the court's power to do this is limited and is not exercised until after litigation is in its final stages and the outcome of these arguments cannot be predicted with any certainty.

It is well known that legal costs incurred in litigation can exceed the amount in issue and that litigation subjects a non-corporate litigant to great emotional and financial strain and time loss, even where the litigant is ultimately successful. The public should not be unnecessarily subjected to this, particularly where the form is prepared by a state-wide body rather than by an individual firm.

Yours faithfully
Michael Blay

18 August 2005

Mr R Kelly
President
Real Estate Institute of NSW
C/- Kelly & Sons Real Estate
FAX 95501989

Dear Mr Kelly

Re: Exclusive Management Agreement Residential EFM00100

1. I write to draw your attention to clause 20 of the abovementioned standard form of agreement issued by your institute and used by all or almost all estate agents in this state. The clause reads—

> 20. The Principal will hold and keep indemnified the Agent against all actions, suits, proceedings, claims, demands, costs and expenses whatsoever which may be taken or made against the Agent in the course of or arising out of the performance or exercise of any of the powers, duties or authorities of the Agent under this agreement.

Effect of Clause 20

2. The effect of this clause is extremely wide and would result in the Principal (the property owner) having to indemnify the agent where, for example—

(a) the agent or agency employee has a motor accident on the way to inspect the property, when driving a prospective tenant to look at the property or otherwise when doing something in relation to the property;

(b) an agent or agency employee injures someone or something when doing something in relation to the property, such as—
  (i) accidentally knocking someone over or even poking someone in the eye with an umbrella;
  (ii) hitting someone if the employee became involved in a fight; or
  (iii) accidentally damaging valuable ornaments or furniture,

(c) workers compensation, if an employee of the agent is injured when doing something in relation to the property.

3. These matters are all outside the property owner's control and insurance against them by the property owner would be extremely difficult and expensive to obtain, and in the case of motor vehicle and worker's compensation insurance virtually impossible, whereas the agency should be insured against them and have some control over their occurrence. Further, it would be easy for an agent to say he was on the way to the property to do a drive past inspection or to attend to some other matter relating to a property when an incident occurred, when in fact he was on the way home or to lunch etc.

4. Although the clause has been used for some years, I have not to date seen any instances of the application of the clause reported, but claims under the clause for less than $100,000 probably

would not be reported unless the property owner was sufficiently outraged to seek publicity and some people, particularly the elderly, might just accept it as something they have carelessly agreed to or as to which they had no choice. In any event, there is always a first time and if the clause is not intended to be used it would not be there.

Insurance

5. One would expect matters covered by the clause to normally be dealt with by an agent's insurer, but sometimes—

(a) a policy is accidentally or recklessly not renewed;

(b) a condition of the policy is not complied with or the application is incorrectly completed;

(c) an exclusion clause applies (eg some motor vehicle policies exclude liability if the vehicle is not in good condition or if the driver was breaking the law or makes an admission); or

(d) an insurer becomes insolvent.

6. I therefore telephoned the Real Estate Institute of NSW and spoke to the appropriate person there, whose Christian name (Tim) only is known to me, and was shocked to be told that—

(a) it is indeed intended that the property owner is liable to indemnify the agent in respect of the matters referred in paragraph 3 above; and

(b) the insurer that handles real estate agents' indemnity insurance insists on the clause being included in agency agreements and an agent would not be protected by that policy if the clause is omitted.

7. It follows that the insurer contemplates recovering from the property owner monies it pays an agent under its policy in respect of matters covered by the clause. In this regard I note that most, if not all, policies contain a *subrogation clause* that allows an insurer to recover monies paid to an insured from anyone liable to the insured.

8. The Real Estate Institute officer stated that the property owner should be responsible for all the acts of an agent carried out on behalf of the property owner, just as the property owner would if he acted personally without an agent, and should have to take the bad with the good. He had no answer when I pointed out the following vital distinctions.

9. A property owner can insure himself against most eventualities with motor vehicle insurance, personal liability insurance and Workers Compensation Insurance but it would be practically impossible, and if possible prohibitively expensive, for a property owner to insure an agent's motor vehicles, particularly in the case of a large agent. To obtain such insurance particulars of the vehicles and drivers and their claims and driving history have to be given and there are exclusions for vehicles not in safe condition or if the driver is breaking the law. All these matters would be unknown to, and not under the control of, the property owner and would change from time to time without his knowledge.

10. To obtain Workers Compensation Insurance, particulars of numbers of staff, gross wages and claims history of the business must be given, all unknown to the property owner, and all the agent's staff would have to be covered.

11. The normal form of Landlord Insurance policy covers liability for injury arising from ownership of a property, but liability resulting from an agreement to assume liability is specifically excluded. Thus the property owner's liability under the subject clause would be excluded and he would be uninsured against a claim by an agent under the clause. Enquiry to my property insurer, the GIO, revealed that it does not offer a policy to cover the subject clause, even at extra cost.

12. If an insurer did allow a property owner to insure against general liability for acts of an agent, particulars of the agent's business would be required of which the property owner would be ignorant, such as total annual income and number of staff and claims history, and there would be exclusions for certain actions over which the property owner would have no control. I doubt if any

agent would want to disclose his business details to each and every customer whose property he manages.

13. Thus the Real Estate Institute of NSW apparently considers it reasonable —

(a) for motor vehicles and employees of each of the thousands of agent in NSW to be separately insured hundreds or thousands of times under motor vehicle and workers compensation insurance by each customer who has a property under management by it, notwithstanding the enormous cost that would be involved if such insurance were possible, and is not concerned by the impossibility of taking out such insurance; and

(b) for the property owner to be personally responsible for negligent acts of agents, notwithstanding that it is cheap and easy for the agent to insure against liability and impossible for the property owner to.

Agents' responsibility

14. Estate agents are well rewarded for the work they do and should be able to take responsibility for, and insure, their own actions rather than make the property owner liable for their mistakes or misconduct. An agent is carrying on business and, like other business people, should be competent to attend to the tasks involved, and will in most cases be in a better financial position than the property owner who will often be a retiree with no other investment properties or someone struggling to meet mortgage payments. The amounts involved could run into hundreds of thousands or even millions of dollars and could result in the property owner's bankruptcy or ruin.

Intent of clause

15. It may be that, notwithstanding what I was told by Tim, this clause is intended to cover only some limited legitimate circumstance and not to extend to wider liability and that its extreme width is due to lazy or incompetent drafting but, if this is so, it should be immediately reworded, as in its present form it is dangerously and unnecessarily wide. A legitimate subject for an indemnity clause would be protection of an agent from claims arising from a defect in the property owner's title to the property, but that requires a clause nothing like the subject one. However Tim, who is apparently the Institute's spokesman on this topic and seems to be its office manager, incredibly stated that he considered that the clause should be made even wider!

Customers' understanding of clause

16. As you would be well aware, most members of the public tend to sign long, complex, closely printed forms without reading them carefully and, even if they do, few understand the full legal consequences of clauses such as the subject one. Even fewer would take a management agreement to a solicitor for advice, particularly where it is prepared by the Real Estate Institute and used universally, and hardly anyone would expect an agreement relating to residential property management to contain such an important and inappropriate clause.

17. Until the clause is discontinued, agents should advise each property owner separately in writing prior to entering into a management agreement that he is, without any logical reason, being required to assume a potentially unlimited liability for the agent's negligence against which it is impossible to insure.

Alternate insurer

18. The fact that the Institute's present insurer allegedly requires the subject clause is no excuse, as another insurer could no doubt be found that does not require it. If the Real Estate Institute with its huge group bargaining power cannot find an insurer that is prepared to cover the risks in question, how is each individual property owner expected to do so, particularly as a property owner has far less information or control over the risks?

19. It may be that an unreasonably low premium has been negotiated as a result of the clause's inclusion and that agents are saving a small amount of money at the expense of their customers. Whatever the reason, the result is an outrageous scandal.

20. In any event, it is very unlikely that the liability insurer referred to above also covers agents for motor vehicle insurance and workers compensation insurance. Accordingly, these areas at least could be excluded from the operation of the clause pending a renegotiation of the indemnity policy.

Clause 5

21. A similar inappropriate shifting of responsibility, from the person whose actions give rise to a claim to the property owner who has no control, occurs in clause 5 which states—

> For Lease: permission is hereby granted for the Agent to erect "For Lease" (sic). It is acknowledged that the Agent is not responsible for any liability, damages or injuries incurred as a result of the erection of the signage.

22. Where, as often happens, the property owner lives a considerable distance from the property, he will have no knowledge of the sign construction, exact location or possible danger involved, whereas the agent is the expert on the spot. Many of the comments in respect of clause 20 also apply to this clause. While some limited protection for an agent at the owner's expense may be justified, if the agent is unreasonably negligent there is no reason why he should not be responsible. The scope of the present clause should accordingly be restricted.

Lack of alternatives for owners

23. If a property owner complains to an agent about clauses 5 and 20, the agent will be reluctant to depart from the Institute prepared form in case it exposes itself to some unforseen liability and, as all agents use the same form, there is no freedom of choice. It is thus necessary for the Institute to amend its form rather than for individual agents to do so.

24. There is nothing that a property owner confronted with the standard form of management contract can do other than choose to manage the property himself, which is not an option for property owners who through lack of time, age, infirmity or distance are unable to do so. Also, most property owners lack the experience and knowledge to choose tenants, carry out and record inspections and comply with the law relating to tenancies.

Action

25. For the above reasons, it is clear that a very serious and unnecessary problem has been created by clauses 5 and 20 and it is essential that it be remedied without delay. I trust that, now that it has been brought to your attention, this will be done. If not, I will have to take the matter further.

26. Avenues that come to mind are appropriate government bodies, including the ACCC, the appropriate Minister, my local member, talk back radio, journalists and investigative television programs. Most of these courses would, of course, result in very unfavourable publicity for the Institute. Unlike the usual unfavourable publicity that agents receive from time to time, this publicity would not be restricted to one or two individuals but would be a reflection on the Institute and all agents.

27. I realise that you will have to consult with others on the matter, which will take some time, but request that you advise promptly whether serious consideration will be given to it and an idea of the likely time frame.

Yours faithfully

Michael Blay