



23 September 2015

# Beware thy Neighbour (& their dog)

---

**Adrian Mueller:** B.Com LL.B FACCAL

---

**JS Mueller & Co**

Level 1, 240 Princes Highway, Arncliffe NSW 2205  
Phone: 02 9562 1266 | Fax: 02 9567 8551  
[enquiries@muellers.com.au](mailto:enquiries@muellers.com.au) | [www.muellers.com.au](http://www.muellers.com.au)  
DX 25315 Rockdale

## BEWARE THY NEIGHBOUR (AND THEIR DOG)

---

In an interesting case, the NSW Supreme Court recently held that a couple could not pull out of a contract to purchase a strata unit even though substantial changes had been made to a common property garden before settlement of the purchase.

### Introduction

Imagine this. You find the perfect apartment for sale. It is surrounded by lush common gardens. It will be your dream home. You sign the contract to purchase the apartment. Days before settlement, you inspect the apartment. What do you find? The lush gardens are gone. Instead, the gardens have been fenced off and are now patrolled by a dog. What can you do? Can you pull out of the purchase?

### The Facts

Mr Frankel and Ms Rosenfield (**purchasers**) wanted to buy a strata unit in Vaucluse in Sydney's eastern suburbs. One of the reasons they wanted to buy the unit was because there was a landscaped garden on common property which they found particularly attractive. On 1 April 2015, the purchasers signed a contract to purchase the unit for a price of \$2.1 million with a deposit of \$210,000. On 22 July 2015, the purchasers inspected the unit to measure up rooms for bookshelves and other fittings. They observed that there was a hive of activity around one of the other units in the building. They also noticed that a fence had been built across the garden and that a sign had been attached to the fence which read "Beware of the Dog". Significant trees and shrubs had been removed from the garden and a large grey dog was now roaming in the fenced off garden.

### The Dispute

The purchasers were upset about the changes that had been made to the garden. Apparently, those changes had been made by another unit owner without the approval of the owners corporation. The purchasers claimed that they would not have signed the contract to buy the unit if the garden had been in its current condition. They refused to settle their purchase of the unit. The vendors issued the purchasers with a notice to complete to settle the purchase which the purchasers ignored and the matter ended up in the Supreme Court.

### The Litigation

The purchasers claimed that they could pull out of the contract to purchase the unit because the changes that had been made to the garden since they signed the contract meant that they would not end up getting what they bargained for. Indeed, the purchasers claimed that the changes that the other owner had made to the garden (albeit without the permission of the owners corporation) were so significant that they no longer wanted the unit and would not have bought it in the first place.

### The Result

The Supreme Court rejected the purchasers' arguments. The Court held that even though the garden was an important reason why the purchasers chose to purchase the unit, it was not the main reason. The Court was not convinced that the purchasers would not have bought the unit if the garden was otherwise than as it was at the time they signed the contract.

---

### JS Mueller & Co

Level 1, 240 Princes Highway, Arncliffe NSW 2205

Phone: 02 9562 1266 | Fax: 02 9567 8551

[enquiries@muellers.com.au](mailto:enquiries@muellers.com.au) | [www.muellers.com.au](http://www.muellers.com.au)

DX 25315 Rockdale

Further, the Court concluded that the changes to the garden did not mean that the purchasers would end up buying something materially different than what was promised. That is to say, the Court held that the property the purchasers contracted to buy did not differ substantially or materially from what they would end up with.

### **Conclusion**

This case shows that changes that are made to the common property in a strata scheme can impact the sale of a unit in the scheme. But the case also shows that any changes to the common property that are made between the time a contract to purchase a unit is exchanged and settlement of the purchase must be substantial to allow a purchaser to cancel the contract. In this case, the Court ultimately held that the fact that an owner had unilaterally appropriated the common property garden was not a major concern as that appropriation could be reversed by the owners corporation or an order made by NCAT or the Court. The Court did mention the possibility that it might have been appropriate to require the vendors to compensate the purchasers for the changes that had been made to the garden area, but the purchasers did not seek compensation. In the end result, the Court plans to order the purchasers to complete the contract and settle their purchase of the unit in accordance with the contract.

Case name: *Frankel -v- Patterson* [2015] NSWSC 1307

### **Adrian Mueller**

Senior Lawyer

P: 02 9562 1266

E: [AdrianMueller@muellers.com.au](mailto:AdrianMueller@muellers.com.au)

W: [www.muellers.com.au](http://www.muellers.com.au)



<https://twitter.com/JSMuellerCo>

<http://www.linkedin.com/company/j-s-mueller-&-co>

### ***Disclaimer:***

*The information contained in this newsletter is provided for your personal information only. It is not meant to be legal or professional advice nor should it be used as a substitute for such advice. You should seek legal advice for your specific circumstances before relying on any information herein. Contact JS Mueller & Co for any required legal assistance.*

---

### **JS Mueller & Co**

Level 1, 240 Princes Highway, Arncliffe NSW 2205

Phone: 02 9562 1266 | Fax: 02 9567 8551

[enquiries@muellers.com.au](mailto:enquiries@muellers.com.au) | [www.muellers.com.au](http://www.muellers.com.au)

DX 25315 Rockdale