



Off the Plan Sales - When the sun sets, it's well and truly set!

The Supreme Court of Victoria has recently ruled ineffective a condition in a contract for the sale of a property "off the plan" by which the vendor could extend the sunset date for registration of the plan of subdivision.

In *Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223 Bongiorno J considered whether plaintiff purchasers of two lots on a plan of subdivision of a development had lawfully rescinded the contracts by which they bought the lots in light of section 9AE Sale of Land Act 1962 (the Act).

Section 9AE is concerned with the rescission of prescribed contracts. To be deemed prescribed it must comply with s 9AA of the Act, which prohibits the sale of a lot on a plan of subdivision if the plan has not been registered, unless the contract provides certain protections to the purchaser with respect to the deposit required to be paid upon entering the contract. Section 9AE confers a power of rescission upon a purchaser if the plan is not registered "within 18 months after the date of the prescribed contract of sale of a lot on that plan of subdivision, or, if the contract specifies another period, before the end of that specified period but before the plan ... is so registered".

The contracts in *Clifford* were for the purchase of lots on an unregistered plan of subdivision and were considered 'prescribed' for the purposes of the Act. Each of the contracts was conditional upon registration of the plan of subdivision of the development. Each also conferred the right on the purchasers to avoid the contract if the plan was not registered on or prior to "the Plan Registration Date" - a date defined as being "the date that is 30 months after the Date of Sale". The contracts also provided for the Plan Registration Date to be extended at the election of the vendor upon the occurrence of particular contingencies. The vendor's solicitors, purporting to act under this provision, gave notice to the purchasers that the vendor had extended the Plan Registration Date.

After the second such extension, solicitors for the purchasers gave notice of rescission of the contracts. They asserted the contract provision was ineffective in light of section 9AE. The vendor refused to accept the rescission and maintained that the purchasers were bound to complete the contracts. The vendor then extended the Plan Registration Date a third time.

Bongiorno J found that for the purposes of s 9AE the initial Plan Registration Date specified "another period" of 30 months. The defendant vendor argued that the extension provision made the contract compliant with section 9AE because each time the Plan Registration Date was extended, a new "specified period" was created for the purposes of the Act. Bongiorno J held this position to be inconsistent with the purpose of section 9AE, which is to create certainty for purchasers of lots on an unregistered plan of subdivision. The creation of that certainty was said to be the statutory trade-off for permitting a vendor to sell lots "off the plan" before the plan is in fact registered and that the risk of delay is a project risk which ought not be transferred to the purchaser. As such, Bongiorno J declared the contracts of sale were lawfully rescinded and ordered the defendant to deliver deposits, in the form of bank guarantees, given under the contracts to the plaintiffs

Bongiorno J commented that if parties to a prescribed contract wish to stipulate a period other than the statutory period provided, that other period must be specified in the contract itself. Once specified, subsequent changes cannot be made so as to bind the purchaser, by any agreement between the parties, nor by the application of any provision of the contract itself which results in a new application date.

The decision has been appealed. Pending the outcome of the appeal, developers need to be mindful of this decision when planning projects and avoid reliance upon extension clauses.

Should you require advice on any aspects of the Sale of Land Act, please contact:

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