

Recent decisions affecting 'off the plan' sales

Sales 'off the plan' - sunset clauses for registration of the plan of subdivision must be for a fixed time, and cannot be extended

For many years it has been commonplace for 'off the plan' contracts of sale to include clauses granting the vendor a reasonable extension of time to register the plan of subdivision upon giving notice to the purchaser. A recent decision of Bongiorno J in *Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223 suggests that such extensions are invalid.

In *Clifford*, the contract of sale stipulated that the sunset date for registration of the plan of subdivision was 30 months after the date of the contract of sale. This date could be extended by the vendor giving notice to the purchasers in certain circumstances set out in the contract. The vendor served notices extending the date for registration on three occasions. Before the last notice was served, the purchasers served a rescission notice. The purchasers issued an originating motion challenging the right of the vendor to extend the plan registration date beyond the original 30 months.

Bongiorno J held that the contractual provisions that permitted the vendor to extend the date for registration of the plan of subdivision contravened section 9AE of the *Sale of Land Act 1962* (Vic) (the Act) and were therefore of no effect. This meant that the purchasers were entitled to rescind and to recover the deposit.

His Honour held that the option under section 9AE to 'specify' a time for registration of the plan of subdivision other than the period of 18 months referred to in the section requires the vendor to nominate a time *'in explicit terms or conveying it with unambiguous clarity'*. In other words, a definite period of time must be fixed so that a purchaser knows the date after which the contract can be rescinded. The time, once specified, cannot be subsequently extended by the vendor.

Bongiorno J was not prepared to adopt a construction of section 9AE that exposed a purchaser to the risk of the time for completion of a development being extended indefinitely. His Honour described this as project risk that rests with the vendor.

His Honour also held that the right to rescind under section 9AE was unqualified, and arguments of election, waiver and estoppel could not be used to defeat the purchasers' right to rescind.

This decision may surprise practitioners acting for developers/vendors selling off the plan. Based on *Clifford*, 'extension' clauses hitherto thought to be valid may not be. When a plan of subdivision has not been registered within the period specified in the contract, the purchaser may be entitled to rescind.

The decision has been appealed. Whilst the decision of the Court of Appeal is awaited, it would be prudent for vendors and developers to avoid reliance on extensions.

Contractual provisions dealing with deposit bonds must comply with s.9AA - The *Everest* decision

In another recent decision – *Everest Project Developments Pty Ltd v Mendoza & Ors* [2008] VSC 366 (19 Sept 2008) – the Supreme Court again interpreted sections 9AA – 9AH of the Act so as to protect the purchaser of a lot on an unregistered plan of subdivision.

In *Everest*, Hargrave J considered a contract which provided for a deposit bond rather than payment of the deposit to the vendor's solicitors or agent to be held on trust.

The contract did not clearly state that, if the vendor called on the deposit bond, the proceeds could only be paid to the vendor's solicitors or agent. On one view of the relevant provisions, the bond proceeds could be paid directly to the vendor. Even though this did not in fact happen in relation to the contract under consideration, His Honour nevertheless found that the contract was voidable at the option of the purchaser.

There was no appeal, so it remains to be seen whether His Honour's reasoning will be followed in other Supreme Court cases. In the meantime, it serves as a warning to solicitors for developers and vendors. Any contracts they draw or settle which provide for deposit bonds or guarantees should make clear that any proceeds must be paid to the vendor's solicitors or agent to be held on trust and cannot in any circumstances be received by the vendor.

Risk management lessons

Practitioners acting in 'off the plan' sales for **vendors** are urged to ensure that all of their contracts and procedures comply in form and substance with the requirements of sections 9AA – 9AE of the *Sale of Land Act 1962* (Vic).

Practitioners acting for **purchasers** should also be aware of these decisions so that their clients are advised of any rights of rescission they may now have. That advice should take into account the fact that these cases are first instance decisions.

**Legal Practitioners' Liability Committee
July 2009**