

# Legal developments concerning residential off the plan sunset date clauses

Ratnadeep Hor & Jude Mangione | July 2018 | Commercial Disputes & Transactions

## Summary

Since November 2015, amendments to the *Conveyancing Act 1919* (NSW) have been in place which qualify a vendor's ability to rescind contracts for residential off the plan property after the expiry of their "sunset" deadlines.

The amendments have now had time to mature and with several judgements that have since been handed down, it is apparent that the changes have had their intended effect.

Purchasers can now take greater comfort when faced with the uncertainty of residential developments completing in time and the potential opportunity cost associated with buying off the plan residences.

## Background

Concerns had emerged out of the surging NSW property market, particularly in Sydney, over the ubiquitous "sunset date" clauses included in residential off the plan agreements.

These provisions typically allowed for the unilateral rescission of a contract by either party if the residential lot being purchased was not successfully established by a nominated "sunset date" deadline.

The arrangement left open a potential window for vendors to artificially delay the completion of a development and rescind contracts to remarket the property at a significantly higher value (leaving old purchasers with little else other than a refunded deposit).

These concerns made their way to parliament, which in response introduced [s66ZL of the Conveyancing Act 1919 \(NSW\)](#) which took effect on 2 November 2015.

The change now requires vendors to obtain a court order before rescinding their contracts which can only be obtained by satisfying the court that granting the order is just and equitable in all the circumstances.

## Early Cases

[Jobema Developments Pty Ltd v Zhu & Ors \[2016\] NSWSC 3](#) demonstrated the early effects of this new law.

Following the execution of several apartment sale contracts contained in a development, Jobema had purchased the site and took an assignment of these off the plan contracts.

Prior to the takeover, the original developer had performed little to no work on the project. Jobema was subsequently unable to complete development works before the "sunset" deadlines and made an application to court for rescission under s66ZL. Black J dismissed this application determining that Jobema, who was aware of the delay at the time it took over the site, had assumed pre-existing contractual obligations (including the obligation to use reasonable endeavours to register the strata plan by the required date) and was not permitted to rescind the contracts.

[Klein v McMahon \[2017\] NSWSC 1531](#) later demonstrated that any rescission of an off the plan contract will be rendered ineffective if s66ZL is not complied with. Following the expiration of a contract's "sunset date", the vendor (McMahon in this circumstance) attempted to serve an effective notice of rescission on Klein without having made any court application under s66ZL. Darke J, subsequently made an order for specific performance of the contract on the grounds that such an attempt to rescind contracts without an application under s66ZL is ineffective.

## 'Just and Equitable' rescission

[DGF Property Holdings Pty Ltd v Di Federico, Butros & Ors \[2018\] NSWSC 344](#) was a decision which explored the application of s66ZL at considerable length.

Prior to hearing, the proposed development by DGF Property Holdings Pty Ltd (DGF) was inadvertently stalled due to a drawn-out dispute with the owners of land that was included in the proposed subdivision. By this time, residential off the plan contracts had been signed and for various reasons associated with the dispute, the "sunset dates" of these contracts had expired. Due to the increasing costs of the development, DGF made an application to rescind these contracts under s66ZL.

Emmett AJA provided a substantive consideration of the factors taken into account under s66ZL(7) in order for the proposed rescission to be considered 'just and equitable'. These factors included (among others):

- a. The terms of the contract;
- b. Whether the vendor acted unreasonably or in bad faith;
- c. Reasons for delay;
- d. The likely date for creation of the subject lots;
- e. Whether the subject lots had increased in value; and
- f. The effect of the proposed rescission on the purchasers.

Although it was found that DGF was not entirely efficient or competent in carrying out the development, DGF's conduct was not seen to have been in bad faith or unreasonable.

DGF's proposed rescission was therefore only permitted on the condition that it provide the buyers with an undertaking that their lots be re-offered to them at a new price to be adjusted by an 'appropriate rate' (which his honour allowed for determination either between the parties themselves or by a later court hearing) having regard to the losses borne by both the purchasers and by DGF (both potential and actual).

## Conclusion

The requirement for judicial determination under s66ZL and the early history of its favourable application gives greater assurance to off the plan purchasers who are uncertain about the timely completion of their residence.

The assurance provides greater comfort to buyers who wish to commit to an off the plan purchase (and make payment of the initial deposit, stamp duty and conveyancing fees that this commitment would entail).

## For more information, please contact:



**Ratnadeep Hor**

Partner

T: 02 8257 5710

M: 0459 863 146

[ratnadeep.hor@turkslegal.com.au](mailto:ratnadeep.hor@turkslegal.com.au)



**Jude Mangione**

Lawyer