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Solid Investments Australia Pty Ltd v Clifford & Anor [2010] VSCA 59

OVERVIEW

The Victorian Court of Appeal has confirmed that special conditions in off-the-plan contracts of sale that allow for an extension of the date by which the plan must be registered, before a purchaser can rescind the contract, are contrary to the intentions of the Sale of Land Act 1962 (Vic) (**SLA**). In so finding the court substantially agreed with the reasons for decision at first instance. This decision has important implications for vendors, purchasers and financiers.

THE FACTS

The plaintiffs (**Purchasers**) purchased two lots on an unregistered plan of subdivision (known as off-the-plan sales). The Purchasers' contracts were relevantly identical and the same questions arose under each of them.

The contracts were conditional upon registration of the plan of subdivision. The contracts conferred on the Purchasers a right to rescind the contracts

if the plan was not registered on or prior to 30 months after the Date of Sale (the **Plan Registration Date**). This is permitted under s9AE(2) of the SLA.

Section 9AE(2) of the SLA provides:

(2) If the plan of subdivision 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, the purchaser may, at any time after the expiration of the period but before the plan is registered, rescind the contract.

However special condition 4.4 of the contract also purported to give the Vendor a right to extend the Plan Registration Date in certain circumstances by 'such a period as the Vendor may reasonably determine from time to time'.

The Vendor relied on special condition 4.4 to extend the Plan Registration Date three times by providing notice to the Purchasers.



ARTICLE

However after receipt of notice for the second extension of the Plan Registration Date, the Purchasers' solicitors advised the Vendor that the Purchasers did not accept the further extension of the Plan Registration Date relying on s9AE(2). The Purchasers gave notice at this time to the Vendor that they were exercising their right to rescind the contracts.

Some time later, the Purchasers engaged building consultants to conduct inspections of the apartments on the relevant lots and prepared a list of defects.

THE ISSUES ON APPEAL

1 Meaning of 'specifies another period' under s9AE(2) of the SLA

1.1 Decision at first instance

Justice Bongiorno reviewed the legislative history of section 9AE(2) to illustrate that the purpose of the provision was to enable purchasers to know when they would become entitled to

exercise their right to rescind a contract if the plan of subdivision was not registered in a specified time period. His Honour held that the 'clear statutory purpose of s9AE was to create certainty for a purchaser of lots on an as yet unregistered plan of subdivision...that was the statutory trade-off for permitting a vendor to sell lots "off the plan" before the plan was registered'.¹

His Honour held that once a contract of sale stipulated a period by which a plan of subdivision must be registered before the contract can be rescinded (in this case, 30 months after the Date of Sale), that period could not subsequently be changed by agreement between the parties or by the application of a provision in the contract that permits a new plan registration date.

His Honour therefore held that the Purchasers were entitled to rescind the contracts.

1.2 Decision on appeal

In determining the meaning of 'specifies another period' under s9AE(2), the Court of Appeal relied on the *Macquarie Dictionary's* definition of the words 'specify' and 'period' and *United Repairing Co Ltd v Glover*² to conclude that in order to 'specify another period' the contract must mention a period of time specifically, the period of time being fixed, definite and certain.

The Court of Appeal could not find any policy reason for extending the meaning of 'specifies another period' to encompass the Vendor's right under special condition 4.4 to specify another Plan Registration Date at some time in the

future, based on a wide range of circumstances provided for in the contract.

Appeal Justice Mandie said: 'In the present case, I cannot identify any reason of policy for extending the meaning of "specifies another period" so as to encompass the specification of a period by reference to an ascertainable event, let alone so as to permit the creation of machinery for the identification of the period at some time in the future, such machinery to be activated by the Vendor on the basis of a set of wide contractually provided circumstances. On the contrary, the section on its face and in its context must be taken to have intended to establish an identifiable period at the time the contract is entered into and I would also endorse the reasoning of the trial judge as to why that is so'.³

The Court of Appeal also endorsed the trial judge's interpretation of the purpose of s9AE(2).

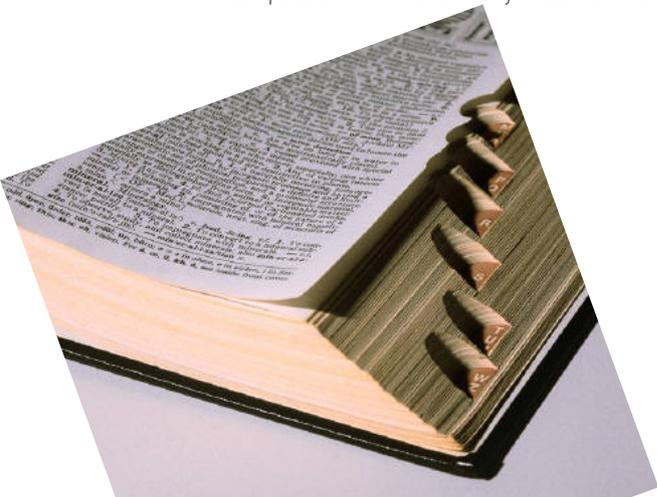
2 Whether s9AE(2) SLA excludes reliance upon doctrines of election, waiver and estoppel to defeat the right of a purchaser to rescind a contract

2.1 Decision at first instance

The Vendor argued that the Purchasers had affirmed the contracts by engaging building consultants to inspect the apartments. Justice Bongiorno relied on *Everest Project Developments Pty Ltd v Mendoza & Ors*⁴ in which Hargrave J

¹ *Clifford v Solid Investments Australia Pty Ltd* [2009] VSC 223 at para19. ² [1945] NZLR 160.

³ *Solid Investments Australia Pty Ltd v Clifford* [2010] VSCA 59 at para 31. ⁴ [2008] VSC 366.



expressed the view that it would be inconsistent with the purpose and policy underlying ss9AA to 9AH of the SLA to allow vendors to rely upon the conduct of the purchasers as depriving them of their unqualified right to rescind a contract under s9AE(1). His Honour said the same reasoning applied to s9AE(2) and he adopted the reasoning and conclusion of Hargrave J.

In any event, the Purchasers' engagement of building consultants occurred after they had unequivocally rescinded the contracts and therefore could not be relied upon as constituting a waiver or election.

2.1 Decision on appeal

The Court of Appeal found it was unnecessary for the trial judge to determine whether s9AE(2) excluded reliance upon doctrines of election, waiver and estoppel to defeat the right of a purchaser to rescind a contract. The Court of Appeal held there was no case of waiver or election available to the Vendor, since by the time the Purchasers had engaged building consultants, the Purchasers had already unequivocally rescinded the contracts. The contracts could not be affirmed once they had been unequivocally rescinded.

IMPLICATIONS

For vendors and purchasers, the 'balance of power' in off-the-plan sales has tipped somewhat in favour of purchasers. Vendors can no longer rely on a contractual right to extend the plan registration date beyond the specified period in the contract, be that either the statutory period of 18 months or another specified period in the contract.

Current contracts should be carefully reviewed to see whether vendors are at risk of purchasers rescinding and whether purchasers are able to exercise their rights of rescission.

Given that delays in construction are common, it is likely that, as a consequence of this decision, vendors will need to specify in future contracts a period for plan registration that well exceeds the statutory period of 18 months. This may, however, diminish the 'sales proposition' for purchasers.

For financiers, this decision may lead them to impose stricter completion requirements on developers and to require a greater minimum pre-sale requirement. Financiers will also need to reassess the viability of funding off-the-plan developments to determine if this decision has increased funding risk factors beyond an acceptable level. Financiers should also review existing contracts and, where necessary and practicable, require purchasers to enter into a variation of existing contracts so that they provide for a 'compliant' plan registration.

Where the terms of contracts for off-the-plan sales are still under negotiation, financiers should conduct pre-settlement due diligence to ensure those clauses dealing with the plan registration date comply with this decision.

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