

# ALERT

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## *Joseph Street Pty Ltd v Tan* [2012] VSCA 113 - 'Best endeavours' and 'off-the-plan' sale contracts

### Recent judgment on a developer / vendor's obligation to use its 'best endeavours'

In *Joseph Street Pty Ltd v Tan* [2012] VSCA 113, the Victorian Court of Appeal determined that a developer was in breach of its obligations to use its 'best endeavours' to register a plan of subdivision, saying that a developer must do more than just take reasonable steps to attempt to register the plan.

The parties entered into an 'off-the-plan' sales contract on 18 September 2005. It was an express term of the contract that the vendor, who was also the developer, would 'at its own expense and with all reasonable expedition' use its 'best endeavours' to procure the registration of the plan of subdivision within 15 months from the day of sale.

It was accepted by the parties that the contract also contained an implied term that the vendor's obligation to use its best endeavours to register the plan of subdivision continued after the expiration of the 15 month period (being 18 December 2006) until either party

rescinded the contract or the plan of subdivision was registered.

On 19 September 2007, after experiencing problems with its appointed builder, the vendor purported to rescind the contract. On 1 April 2008, the plan of subdivision was registered.

The purchasers brought proceedings against the vendor, alleging it was in breach of its 'best endeavours' obligation and therefore was not entitled to rescind the contract. The purchasers argued that the vendor could and should have sought to enter into an agreement with the council under section 173 of the Planning and Environment Act 1987 (**section 173 agreement**), which would have expedited the process of registration.

The Court of Appeal said that the question of whether the vendor complied with its best endeavours obligation was to be determined on an objective basis. The court held that an obligation to use **best endeavours** to achieve a contractual object requires the obligor to do all he or she reasonably can in the circumstances to achieve that contractual object. The meaning of the words was plain - a developer



must use its best endeavours, not its 'second-best endeavours' and so within reasonable limits, the vendor is 'to leave no stone unturned to achieve the object in view'.

On the face of the legislation, a potential method of expediting the registration of a plan of subdivision for a development of the kind under consideration was to enter into a section 173 agreement with the local council.

It said that a party wishing to rescind the contract cannot take advantage of its own ineffective or inefficient measures to comply with its contractual obligations and where it is the vendor's default that has deprived the purchaser of a 'substantial chance' that the condition would have been fulfilled, the vendor is not entitled to exercise the right of rescission.

The court held that the vendor was plainly in breach of its obligation to use its 'best endeavours' when it failed to pursue the section 173 agreement with the council and ordered specific performance of the contract of sale. The vendor was effectively forced to complete settlement with the purchasers.

## The effect of the judgment

Developers/vendors should note the following effects of the judgment:

- A developer/vendor cannot rely on its own inefficient measures to comply with its contractual obligation to rescind an 'off-the-plan' sales contract.
- A developer/vendor should avoid inserting clauses that expressly provide for it to use its best endeavours to register

the plan of subdivision.

- Where there is an obligation (either implied or express) to use its 'best endeavours', it is clear from this case that the obligation continues until the plan is registered or the contract is lawfully rescinded.
- The obligation is onerous - the developer/vendor must do all it reasonably can in the circumstances to achieve the contractual object, namely the registration of the plan of subdivision, before it will be entitled to rescind the contract of sale.

Before rescinding a contract, a developer/vendor should consider and seek advice as to whether on balance it has used its best endeavours.

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