

ALERT

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Case Note: Important judgment on off-the-plan contractual provisions

The Supreme Court of Victoria recently added to the interpretation of section 9AE(2) of the *Sale of Land Act 1962* (SLA) when it handed down judgment in *Allen v Harofam Pty Ltd* (**Harofam**) and confirmed that a vendor:

- must nominate a certain period for registration of the plan of subdivision at the time of entry into the contract; and
- cannot seek to rely on a contractual provision that purports to extend the period for registration beyond that nominated period (even if that extension concerns a fixed period).

Section 9AE of the SLA deals with a purchaser's right of rescission in off-the-plan sales contracts. Section 9AE(2) permits the parties to an 'off the plan' sales contract to specify a period within which the plan of subdivision must be registered. However, a failure by the vendor to register within this time enables a purchaser to validly rescind the sales contract and retrieve their deposit.

In April 2010, we reported on the Court of Appeal's judgment in *Solid Investments Australia Pty Ltd v Clifford* [2010] VSCA 59 (**Clifford**). In

Clifford, the contract of sale provided for a registration period of 30 months after the contract was entered into. However, it also included a special condition that purported to allow the vendor to extend the period of registration for a 'reasonable period' upon the happening of certain events.

The court held that a provision which purported to extend the period for registration of a plan of subdivision on the occurrence of an event (for example: delay by authorities, weather or industrial action) did not 'specify another period' for the purposes of complying with the section. It said 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' [emphasis added].

In *Harofam*, the contract of sale contained a similar provision to that contained in *Clifford*, allowing the vendor to extend the date for registration of the plan of subdivision, except that the clause referred to a fixed period of 6 months by which the registration date could be extended, unlike in *Clifford*, which provided for a reasonable period.



The vendor in Harofam sought to distinguish the provision from that contained in Clifford, and argued that the differences that existed were 'critical', particularly because the clause in Clifford was 'open ended'.

Chief Justice Warren rejected the vendor's submissions, holding that the present case fell squarely within the principles set out in Clifford. Her Honour stated that the exercise of the right to nominate another plan registration date, even if limited by a special condition to a finite range of dates and occasions, did not constitute a nomination of a particular specified date that is 'fixed, definite and certain'.

The Chief Justice further said that s 9AE(2) required the contract to specify the alternative period to that which is fixed by the section (namely 18 months) for the purposes of the purchaser's right to rescind. Her Honour considered that a specified date was 'defined by a specified commencement date and specified end date'. In conferring on the vendor a right to change the end date of the specified period of 24 months in the special condition, her Honour said the special condition had failed to specify any period other than 24 months for the purposes of the right to rescind.

Consequences

Recent economic times have seen the stagnation and, in some areas, the decline in real property values. The consequence is that, as purchasers are now coming close to settlement, banks are revaluing properties at significantly less than the contract price that may have been entered into several years ago.

In many cases, where contracts were entered into prior to the decision in Clifford, a number of vendors sought to vary their contracts with purchasers by way of written variation agreements. There is some debate as to whether this is sufficient to validly extend the registration date under a contract subject to s 9AE(2). This follows from the judgment of Bongiorno J in the hearing at first instance of Clifford in the Supreme Court, where his Honour stated that once the date in the contract has been specified, 'it cannot be subsequently changed, so as to bind the purchaser, by any agreement between the parties, nor can it be changed by the application of any other provision of the contract itself which results in a new application date, such as Clause 4.4 in this case'.

Vendors need to be aware of the implications of these decisions, namely that any clause purporting to extend the period for registration beyond a nominated date will be invalid. Accordingly, a purchaser will be entitled to rescind the contract and to a return of their deposit.

Vendors should tread with caution when a purchaser acts to rescind the contract and seek legal advice if they are uncertain as to whether the purchaser is entitled to rescind under the contract.

We recommend you review your 'off the plan' sales contracts regularly to ensure they remain enforceable against the purchaser.

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