

WHAT HAPPENS WHEN IT ALL GOES WRONG: DEFAULT, RESCISSION AND REPUDIATION

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Strategic considerations for the purchaser

- Do I have the appetite to take on a well resourced developer? Am I alone in this or are there other disgruntled purchasers with whom I can band to re-balance the asymmetry of power?
- Do I have necessary information to form a view on prospects of success?
- Should I lodge a caveat to protect my interests? Do I have a caveatable interest? What is my exposure to an order for compensation?
- Should I roll the dice and see what later washes up in documentary production?

Or

- Should I make an application for preliminary discovery under UCPR Pt 5?

STRATEGIC CONSIDERATIONS FOR THE DEVELOPER/ VENDOR

- Is there any validity to the purchaser's complaint?
- Is there an economic way to address the complaint of the purchaser? (e.g. if variance between what's represented and what's delivered).
- Is there a que of disgruntled purchasers standing behind a complainant? What are the consequences of settling the complaint?
- Is there a reputational issue?

RESCISSION in the context of the Standard Form

- Rescission means unwinding a contract *ab initio* i.e. from the beginning: see Definition section of the Standards Form.
- The general “shape” of the remedy for rescission afforded under the Standard Form is *restitutionary*, as opposed to damages: title stays with the vendor, and the purchaser gets back the deposit.

STATUTORY RIGHTS TO RESCIND

- The *Conveyancing Act & Conveyancing (Sale of Land) Regulations* give wide ranging rights to rescind.
 - e.g. for breach of implied warranties in Sch 3 to the Regs.
- Sec 66 L (power to rescind contract where land substantially damaged)
- Sec 66 M (abatement of purchase price where land damaged)
 - e.g. when fire damage occurs between exchange and completion: see *Bakhos* and *Urban House*, both [2007] NSWSC.
- Sec 66 ZL (sunset dates not met by developer)
- Sec 66 ZM (disclosure statement to be attached to off the plan contract)

RESCISSION IN THE STANDARD FORM

- **CI 8.1** Vendor can *rescind* if unable etc to comply with requisition
- **CI 19** Consequences of *rescission* e.g. return of deposit
- **CI 23.8** Right of purchaser to rescind if costs greater than 1% of the contract
- **CI 28** If the land being sold is a lot in an *unregistered plan*, and the plan is not registered in the delimited time, then
 - the purchaser can *rescind*
 - the vendor can *rescind*, but only if its done everything reasonably possible
- **CI 29**: right to *rescind* if contract conditional and condition not met

Conditional Contract: example

- Contracts can be made conditional upon a range of matters, e.g. on the vendor obtain a building certificate, as in in *Maloy's* case [2003] NSWSC.
- The essential determinant in this kind of situation is the plaintiff demonstrating a causal relationship between lack of activity and absence of the certificate.
- The vendor may well prevail if there are substantial causal links in the chain beyond the reach of its reasonable endeavours.
- NOTE that the schema about rescission in Sec 66 ZL *Conveyancing Act* only applies where the contract for the sale of residential lot can be rescinded if the lot is not created by the sunset date.

Sec 66 ZL *Conveyancing Act*

- *Abourjaily* [2017] NSWSC considered whether the vendor's right to rescind 7 contracts in a 57 lot sub division for the sale of land "off the plan" was conditional upon it having used all reasonable endeavours.

It was held that the vendor had not used reasonable endeavours as required under Cl 3.1 (a), and was thus disentitled, as a matter of construction, from rescinding under Cl 3.1 (b)

The plaintiff persuaded the Court that there was sufficient time from the dates of the various planning approvals for the subdivision works to be designed, approved, constructed and certified in order for the plan of subdivision to be registered by the sunset date.

The defendant was unsuccessful in its stance that it was delayed by events beyond its control e.g. discovery of asbestos fragments on site.

See also *Silver Star Fashions* [2018] NSWSC

TERMINATION in the STANDARD FORM

- **CI 3.5** vendor can **terminate** if purchaser does not honour obligations as to deposit bond
- **CI 3.10** consequences of **termination** by vendor e.g. vendor can demand payment from issuer of deposit bond
- **CI 3.11** consequences of **termination** by purchaser, e.g. vendor must return deposit bond
- **CI 8.2** if vendor does not comply with the contract (*or notice under it*) in an **essential** respect, the purchaser can **terminate**, recover the deposit and sue for damages
- **CI 9** Vendor can **terminate** if purchaser defaults in an **essential** respect (including non compliance with a notice under the contract)

Clause 9 Standard Form

- *“..... clause 9.3.1 does not expressly provide that moneys payable under it are payable as liquidated damages. However, that is its effect ... Accordingly, ...it is no answer to a claim under clause 9.3.1 that in a particular case, a vendor might be over-compensated.....”*

June St Clare Buchanan [2007] NSWSC

WHEN IS AN OBLIGATION ESSENTIAL?

- When the contract says its essential e.g. Cl 2.1 & 2.2: time for payment of deposit, essential.

cf Cl 21.6 “Normally, the time by which something must be done, is *fixed but not essential*”.

Breach of an essential term allows innocent party to terminate for fundamental breach.

Repudiation also allows the innocent party to accept the repudiation, and terminate.

Whilst a breach of an essential term may constitute repudiation, this is not necessarily so: see *Impact Funds Management* para [183]

REPUDIATION

- Repudiation occurs where one party is either unable or unwilling to perform its contractual obligations. The analysis focuses on the readiness and willingness of a promisor to perform.

If the promisor is not ready and willing to perform its obligations or at the contractually appointed time will be unable to perform, then the promisee has a right to terminate the contract, but only so long as the requirement of *seriousness* is satisfied.

- *Beware*: wrongful termination can constitute repudiation, which the other side can then accept, and claim damages for loss of bargain: see *Proctor's* case [2008], where the vendor issued a precipitate notice to complete.

NOTICES TO COMPLETE: Requirements 1 & 2

- Requirements for a party to issue a notice to complete are:
 - breach/ unreasonable delay by the promisor in performing a *time stipulation*;
and
 - no breach by the promisee.
- In order to determine whether or not there has been any ‘unreasonable delay’, it should be delay *relevant to or connected with the securing of completion*.

Neeta (Epping) v Phillips; Balog v Crestani

NOTICES TO COMPLETE: RWA

- The third requirement for a valid notice to complete is that the vendor be ready, willing and able to complete.
- UCPR UCPR 14.11 presumes a party who needs to show it is “ready, willing and able”, is indeed so.
- As such, it’s up to the person wishing to negate that the other side was ready willing and able, to put that in issue e.g. on the pleadings/ by letter/ *etc.*

NOTICES TO COMPLETE: PRACTICAL TIPS

- “Unless you complete by 2 pm on the 10th October, the Vendor reserves the right to exercise ALL of its rights and remedies.”
[BAD IDEA TO SAY THIS – WHY ?]
- Get the maths rights: a notice to complete must not demand more than the contract entitles; & dates and times must be as per the contract. Beware interaction of standard terms and special conditions.
- Comply with the rules relating to how time is computed: either as per the special conditions OR at common law.
- Pleading of ready / willing / able.

Compare Notices to Complete v to Perform

The idea of a *notice to perform* was considered in *Gustin v Taajamba*:

*“a distinction is to be drawn between.....a notice to perform and a notice to complete. Where a party does not in due time perform an obligation **prior to the obligation to complete**, the other party may, by a notice, fix the time for the performance of that obligation. The effect of such a notice to perform, properly given, is twofold: it fixes a further time for the performance of the obligation; and it makes the obligation an essential obligation of the contract, in the sense that failure to perform it by the new time is a ground for termination of the contract for breach.”*

The Golden Thread

- It may be that the golden thread in the cases I analyse in my March 2019 seminar paper referenced in the final slide, is that Notices to Perform are only valid in laying the foundation of repudiation argument, if the obligation is one that needs to be done in *order to get to completion* e.g.:
 - proffering a form of conveyance / assurance/ transfer;
 - answering requisitions;
 - building the home for the purchaser to occupy before completion.
- On this approach, the term under consideration must *not* be one that is minor; it must be one of some substance; i.e. one where the promisee would not have entered into the contract unless assured of, at the least, “*substantial performance*”.

NSW standard contract, clause 9

- If the purchaser does not comply with this contract (or a notice under or relating to it) in an *essential respect*, the vendor can *terminate* by serving a notice.
- After the termination the vendor can –
 - [9.1] keep or recover the deposit ...
 - [9.2] hold any other money paid by the purchaser under this contract as security for anything recoverable under this clause – [9.2.1 & 9.2.2]; and
 - [9.3] sue the purchaser for
 - (the deficiency on resale and costs and expenses)
 - (to recover damages for breach of contract)

Vendor must set off the deposit

- In certain circumstances, the vendor who terminates and claims damages from the purchaser, must set off the deposit. There are technical rules around this: *Cratchley v Bloom*.

However, the condition considered in *Cratchley* is in substantially different terms from the modern clause.

Flight v Booth

- Cl's 6 & 7 of the Standard Form deals claims by the purchaser for error / misdescription.
- The rule associated with *Flight v Booth*, an 1834 UK case, cuts across Cl's 6 & 7 and says that a purchaser can rescind for error/ misdescription that is substantial and material.

BUT the argument in favour of rescission will be much stronger where the difference of value is uncertain and arbitrary as a result of the error / misdescription. And vice versa – *so apply with caution!*

[See discussion in my papers referenced in the end slides, including of *Raphael Shin NSWCA*]

CAVEAT, VENDOR

(let the vendor beware of caveats!)

- **Cl 2.8** of the NSW Law Society Standard form contract for the sale of land says that if a deposit is paid before completion to the vendor, it is a charge on the land in favour of the purchaser, until termination by the vendor or completion, subject to any existing right.

The clause covers the situation where there has been neither completion nor termination, and confers what was described in *Marinkovich* at [69] as an “equitable charge”.

- There is also a general law doctrine whereby the purchaser has a equitable lien in respect of the deposit, where the contract for the sale of land goes off without any default on its part (ibid).

CAVEAT, VENDOR

- A caveat will be sustained if the purchaser can demonstrate a serious question to be tried that it has a caveatable interest, and the balance of convenience favours the maintenance of the caveat: *Bayblue* para [20].

CAVEAT, VENDOR

(developer beware of a caveat!)

- If the purchaser is dissatisfied because of a variation between what was represented in a pre contract sketch, or in a contract sketch, and what was actually constructed, then the purchaser's options include:
 - i. complete and seek damages / compensation (depending on the terms of the contract);
 - ii. *resist* the vendor's notice to complete on the principles including those in *Neeta & Balog's cases; Flight v Booth & Sec 18* Australian Consumer Law etc (and thus seek to prevent the vendor issuing a notice of termination, including by interlocutory injunction if necessary);
 - iii. lodge a caveat to protect the deposit (if the contract does not proscribe this, which most bespoke contracts do).

PRACTICE TIPS FOR SOLICITORS ACTING FOR PURCHASERS “OFF THE PLAN”

- Advise that there are disclaimers on the pre contract sketch and that cases go both ways on whether they can be relied on.
- Advise that the contract has exclusions and limitations of liability, including innocuous sounding “entire agreement” clauses, which like Kubla Khan’s caverns, are measureless to man: and cases go *both ways* on these.
- The sketch of the floor plan (showing bathrooms / bedrooms/ kitchen/ balcony/ ceiling height etc.) is subject to variation at the whim of the developer, unless the developer is pinned down by the legal equivalent of a nail gun.
- Ditto the proposed, unregistered strata or stratum plan (or both, if mixed use).

AUTHORITIES referred to in the presentation

- *Abourjaily v Parkview Estate Pty Ltd* [2017] NSWSC 1256
- *Ali v Tritton* [2019] NSWCA 111
- *Bakhos v Fenner* [2007] NSWSC 641 and *Urban House Pty Ltd v Purnell Bros Pty Ltd* [2007] NSWSC 1248
- *Bayblu Holdings Pty Ltd v Capital Finance Australia Limited* [2011] NSWCA 39
- *Cratchley v Bloom* (1984) 3 BPR 9432; (1984) NSW ConvR 55-203
- *Flight v Booth* [1834] EngR 1087; (1834) 1 Bing (N.C.) 370
- *Impact Funds Management Pty Ltd v Roy Morgan Research Ltd* [2016] VSC 221

AUTHORITIES referred to in the presentation

- *June St Clare Buchanan v Catherine Elizabeth Dunstan* [2007] NSWSC 248 (see case summary in my presentation, February 2012, on my Wentworth Chambers web page)
- *Maloy v Jelacic* [2003] NSWSC 23; reversed (No 2)[2003] NSWSC 412
- *Marinkovic v Pat McGrath Engineering Pty Ltd* [2004] NSWSC 571; (2004) 12 BPR 22,161
- *Neeta (Epping) v Phillips* (1974) 131 CLR 286
- *Balog v Crestani* (1975) 132 CLR 289
- *Proctor v Chahl* [2008] NSWSC 1252
- *Raphael Shin Enterprises Pty Limited v Waterpoint Shepherds Bay Pty Limited* [2014] NSWSC 743 and on appeal [2015] NSWCA 406
- *Silver Star Fashions Pty Ltd v Dal Broi* [2018] NSWSC 1445

REFERENCES

- *Repudiation, Rescission and Termination seminar - February 2012*
- *When the purchaser doesn't complete: rights of the purchaser to rescind - February 2018*
- *Notices to Perform seminar - March 2019*

All papers available on 13 Wentworth webpage