

NEW SUNSET CLAUSE LEGISLATION AND OFF-THE-PLAN CONTRACTS—WHAT THIS MEANS FOR DEVELOPERS' RIGHT TO RESCIND

Leanne Walker, Partner

Brendan Maier, Partner

Jacqueline Cheung, Solicitor

Jaye Smale, Solicitor

**Colin Biggers and Paisley,
Sydney**

IN BRIEF—AMENDMENT AIMS FOR GREATER PURCHASER PROTECTION

As of 2 November 2015, the *Conveyancing Amendment (Sunset Clauses) Act 2015* (NSW) came into force as the new Division 10 section 66ZL of the *Conveyancing Act 1919* (NSW).

Section 66ZL applies to all off-the-plan contracts for sale of residential lots, regardless of whether they were entered into on or before 2 November 2015, and restricts a vendor from automatically rescinding an off-the-plan contract under a sunset date clause.

WHY THE CHANGE?

The government expressed concern that developers are intentionally delaying the registration of plans past the sunset dates provided for in contracts, with the result that they are free to rescind and resell at a higher price. This leaves a purchaser without a home and facing a new market in which prices have likely increased.

The new section 66ZL has the effect of inserting terms into off-the-plan contracts in an attempt to protect purchasers.

DEVELOPER HAS RIGHT TO RESCIND WITHIN CERTAIN CONFINES BUT MUST EXPLAIN DELAY

Under the Act, the activation of a sunset clause does not automatically allow the developer (as vendor) to rescind an off-the-plan contract (see section 66ZL(5)). If a developer wants to rescind, he or she must do so within the confines of section 66ZL(4), which requires the developer to give the purchaser(s) 28 days' written notice of the proposed rescission, and set out:

- why the developer wants to rescind, and
- the reason for the delay in creating the subject lot.

Section 66ZL(3) provides that rescission may only take place if:

- each purchaser under the contract consents in writing to the proposed rescission;
- the developer obtains a court order permitting the proposed rescission, or
- the proposed rescission is otherwise permitted by the regulations made under the Act

Prior to the new legislation, the decision in *Wang v Kaymet Corporation Pty Ltd* [2015] NSWSC 1459 confirmed that the onus is on the purchaser to prove that the developer's delay in registering plan documents was unreasonable. The effect of section 66ZL reverses the onus, requiring the developer to explain the delay.

COURTS ALSO CONSIDER INCREASED LOT VALUE IN DECISION TO APPROVE RESCISSION

Absent purchasers' consent, section 66ZL(6) gives the court power to make orders allowing the developer to rescind. The developer must prove to the court that the rescission is just and equitable.

Section 66ZL(7) provides a list of factors the court will consider when deciding whether to approve the proposed rescission. One of the more interesting factors that the court will consider is whether the subject lot has increased in value.

Although not mentioned in the Act, the second reading speech notes that 'if the value of the lot has increased significantly, the exercise of the sunset clause is prima facie unfair'.

DEVELOPER PROPOSES TO RESCIND OFF-THE-PLAN CONTRACT ESTABLISHED WITH PREVIOUS DEVELOPER

The case of *Jobema*

Developments Pty Limited v Zhu & Ors [2016] NSWSC 3 involved the proposed rescission of an off-the-plan contract and required the court to apply the new sunset clause legislation introduced by the *Conveyancing Amendment (Sunset Clauses) Act*.

Mr Wu (the purchaser) entered into an off-the-plan contract with Xycom Pty Limited, dated 6 December 2013, for the purchase of a unit at Dora Street, Hurstville (the site).

The contract, amongst other things, provided a sunset date of 31 December 2015.

In 2014, the site was sold by Xycom to Jobema Developments Pty Limited, which is presently developing the site.

On 1 December 2015, Jobema served a notice on the purchaser proposing to rescind the contract and set out the reasons for the delay in creating the subject lot.

Reasons for the delay included:

- from the date of the contract until 5 February 2015, Xycom carried out little or no physical work on the project; and
- since 5 February 2015, Jobema has entered into contracts to sell other lots in the project in order to secure finance for the project.

The purchaser did not consent to the rescission and accordingly, Jobema commenced an application for leave under section 66ZL of the Act for an order permitting it to rescind the contract with the purchaser.

COURT DISMISSES APPLICATION FOR AN ORDER UNDER SECTION 66ZL(6)

An order under section 66ZL(6) of the Act is only made if the court is satisfied that the order is just and equitable in all the circumstances. In determining whether it is just and equitable, section 66ZL(7) sets out the matters the court is required to take into account.

Whilst the court accepted that the evidence indicated that since buying the site in 2014, Jobema had exercised diligence in progressing the construction on the site, the court was unable to disregard Xycom's lack of diligence in considering an order where Jobema had expressly assumed Xycom's obligations under the relevant contract.

The court also observed that several matters which Jobema relied on to support its application have not been established by evidence or otherwise did not assist Jobema in its application.

These included:

- increases in construction costs and purchase prices have not been established;
- the fact that Xycom did not advance the project before Jobema acquired it does not assist it where Jobema acquired the site with knowledge of that position and assumed Xycom's obligations;
- the change in legislation to increase the protection available to off-the-plan purchasers was a business risk that Jobema had to assume; and
- the selective and unexplained process by which some purchasers had their sunset dates extended by agreement with Jobema, and others did not, tended against the grant of leave sought.

In light of the above factors, the court dismissed the application for an order to be granted in favour of Jobema.

COURT WILL CONSIDER ALL SECTION 66ZL(7) MATTERS, MAY CONSIDER PRIOR VENDOR'S CIRCUMSTANCES

The decision in *Jobema v Zhu* highlights the approach the court will take in applying the new sunset clause legislation and should be of particular importance to vendors seeking to rescind an off-the-plan contract under a sunset date clause.

The vendor's failure to obtain the order suggests that applicants applying for an order should ensure that appropriate evidence is adduced in respect of all matters set out in section 66ZL(7). Further, it appears that the court will consider not only the circumstances of a present vendor who has assumed obligations under an off-the-plan contract by novation, but also a prior vendor in determining whether an order should be granted.

Leanne Walker, Brendan Maier, Jacqueline Cheung and Jaye Smale's article was previously published on the Colin Biggers & Paisley web site—February 2016. Published with permission.
