Construction, Property & Projects Insights

Issue 4 – June 2016

The purpose of Vincent Young's Construction, Property & Projects Insights is simple – to provide insight into the major issues in construction, property & projects law that will have a real impact on the way you do business, in simple terms that make sense in a real world context.

To discuss anything in this publication, please contact us on **+61 2 9261 5900**.

In this issue, we look at the following key developments in construction, property & projects law:

- **Doyles Guide 2016 │ Vincent Young a 'Recommended' Leading Sydney Construction Law Firm**
- **Contractual Clauses Limiting the Accrual of Reference Dates or a Right to a Progress Payment | Are Your Clauses Void?**
- **Supreme Court Overturns Adjudication Determination for Failure to Apply LDs**
- **Case Law Developments | Required Form of a Supporting Statement and Opportunity to Re-Serve a Payment Claim**
- **NSWCA Upholds Oral Agreement to Lease which was Not Formalised due to Family Honour**
- **Capital Gains Tax Withholding Regime**
- **NSW Stamp Duty and Land Tax Surcharges**
- **Developer Rights under Off the Plan Contracts in a Changing Market**

Doyles Guide 2016 │ Vincent Young a 'Recommended' Leading Sydney Construction Law Firm

Vincent Young is pleased to announce that it has been rated as a recommended Leading Sydney Back-End Construction Law Firm in the Doyles Guide 2016.

This list details firms practising within the areas of contentious construction, projects and infrastructure matters in the New South Wales legal market who have been identified by clients and peers for their expertise and abilities in these areas.

The full list can be accessed here.

Contractual Clauses Limiting the Accrual of Reference Dates or a Right to a Progress Payment | Are Your Clauses Void?

In the recent decision of J Hutchinson Pty Ltd v Glavcom Pty Ltd [2016] NSWSC 126, Ball J held that a contractual precondition to the accrual of a reference date and a right to receive a progress payment was void under the Building and Construction Industry Security of Payment Act 1999 (SOP Act).

Background

The case concerned a subcontract between J Hutchinson Pty Ltd (**Hutchinson**) and Glavcom Pty Ltd (**Glavcom**) dated 31 July 2014, under which Glavcom agreed to carry out the design, fabrication

and installation of joinery at the Bondi Pacific as subcontractor to Hutchinson (**Subcontract**).

Hutchinson sought to set aside an adjudication determination made in favour of Glavcom under the SOP Act.

One of the issues before the Court was whether clause 37.0 of the Subcontract was void. Clause 37.0 of the Subcontract required Glavcom to submit a statutory declaration in a particular form as:

> *"a precondition to a reference date arising under the Security of Payment Act, the Subcontractor being entitled to make a payment claim under the Security of Payment Act and to the Subcontractor becoming entitled to make a progress claim".*

Reference Dates and Contracting Out of the SOP Act

Ball J considered section 8 of the SOP Act, which permits a construction contract to state a method for fixing a reference date, but found that section 8 does not permit the imposition of additional conditions to the occurrence of a reference date or to the right to receive a progress payment. Ball J stated at [26] that:

> *"It is apparent from s 8 that the contract can fix a date, or provide a method for fixing a date, other than the date set out in s 8(2)(b). But the section cannot be interpreted as permitting other conditions to be attached to the occurrence of a reference date or a right to receive a progress payment. Any provision that purported to do so would be a provision that sought to modify or to restrict the circumstances in which a person was entitled to a progress payment and would therefore be void under s 34."*

Ball J held that clause 37.0 of the Subcontract sought to add an additional condition to Glavcom's right to obtain a progress payment. In particular, Ball J noted at [27] that it was not clear how the requirement to provide the statutory declaration:

> *"furthers the purposes of the Security of Payment Act, which is to ensure that those who do construction work have a cash flow from that work they do so that they are in a position to meet their financial obligations."*

Accordingly, Ball J held that the provision was void by the operation of section 34 of the SOP Act for seeking to modify or restrict the circumstances in which a person was entitled to a progress payment.

Importance

If your contract contains a clause which sets out preconditions to a contractor's or subcontractor's entitlement to claim or be paid a progress payment, there is a risk that those preconditions will be void and unenforceable under the SOP Act.

Principals and head contractors should review their contracts to ensure that any such payment terms and preconditions:

- provide a mechanism for fixing a reference date, rather than imposing additional conditions; and
- facilitate the objectives of the SOP Act, by having some practical purpose and enabling the timely payment of progress payments under the contract.

If you would like further information about the validity of the payment terms and preconditions under your contract, please contact Brett Vincent or Tanya Lovely on +61 2 9261 5900

Supreme Court Overturns Adjudication Determination for Failure to Apply LDs

The New South Wales Supreme Court has dramatically changed tack and broadened the grounds upon which an adjudication determination under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act) may be challenged.

Probuild and Shade Systems

In the recent case of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770, the Supreme Court departed from settled judicial opinion and decided that adjudication determinations can be overturned not just for threshold errors (such as whether a payment claim or other notice has been properly served under the SOP Act), but also for non-jurisdictional errors such as whether an LD clause has been properly interpreted by an adjudicator.

In response to a payment claim served by Shade Systems Pty Ltd (**Shade Systems**) in the sum of $324,334.26, Probuild Constructions (Aust) Pty Ltd (**Probuild**) issued a payment schedule setting off LDs in the sum of $1,089,990. The adjudicator determined an adjudicated amount of $277,755.03 in Shade Systems favour and determined that Probuild was not entitled to set-off its LDs.

Probuild sought a declaration that the determination be overturned, for amongst other reasons, the adjudicator's misinterpretation of the LD clause. Probuild argued it was clear on the face of the determination that the adjudicator had failed to properly determine Probuild's LD claim. Emmett AJA agreed. The adjudicator had determined Probuild was required to demonstrate that the failure of Shade Systems to complete on time was caused by the defaults of Shade Systems before gaining an entitlement to levy LDs. However this was not a contractual test. The LD clause, as found in many contracts, allowed LDs for each day after the date for completion up to the date of actual completion or termination (with no further qualification).

Acknowledging the error was non-jurisdictional, His Honour Emmett AJA turned to the wording in the SOP Act and previous case-law (including Court of Appeal authority) and contrary to the prevailing view, decided this type of non-jurisdictional error of law by an adjudicator is reviewable by the Court. The determination was overturned.

Impact

For claimants: challenges may become more frequent to "line ball" determinations. An increased focus on robust submissions in

support of claims and in defence of potential set-offs is recommended.

For respondents: the tables may be turning with more of an opportunity to approach the Courts when in receipt of patently wrong determinations under the SOP Act.

A copy of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770 can be found here.

If you would like further information about challenging an adjudication determination, please contact Mark Irwin or Sasha Kolodkina on +61 2 9261 5900.

Case Law Developments | Required Form of a Supporting Statement and Opportunity to Re-Serve a Payment Claim

Recent case law developments in respect of supporting statements under the Building and Construction Industry Security of Payment Act 1999 (SOP Act) confirm that:

- ***if a payment claim is made by a head contractor without attaching a valid supporting statement, it will not be validly served under the SOP Act, such that the head contractor will not have used its reference date and will have another opportunity to submit its payment claim with a valid supporting statement; and***

- ***the supporting statement must be in the form required by the Building and Construction Industry Security of Payment Regulation 2008 (Regulation), such that another form of statutory declaration prescribed by a contract may not satisfy the requirements of a "supporting statement".***

Requirement for Supporting Statements

The mandatory requirement to attach a supporting statement with payment claims made by a head contractor was brought in by the April 2014 amendments to the SOP Act including:

Section 13(7):

> *"a head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim."*

Section 13(9):

> *""supporting statement" means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned."*

***Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334**

The above case concerned a construction contract between Kyle Bay Removals Pty Ltd (**Removals**) and Dynabuild Project Services Pty Ltd (**Dynabuild**) dated 23 November 2015, under which Dynabuild agreed to construct a commercial warehouse in Punchbowl.
In September 2015, Dynabuild (a head contractor under the SOP Act) served a payment claim on Removals without a supporting statement. In November 2015, Dynabuild subsequently served another payment claim on Removals in respect of the same work, but attaching the required supporting statement.

One of the issues before the Court was whether Dynabuild had, in contravention of section 13(5) of the Act, served two payment claims in respect of the same reference date.

Meagher JA held that because the first September payment claim was not served with a supporting statement, it was not validly served under the SOP Act, such that there was no contravention of section 13(5) of the Act. Accordingly, the second payment claim was a valid claim under the SOP Act. Meagher JA held at [37] that:

> *"The reference in s 13(5) to service is to service which has occurred in accordance with s 13. A payment claim served contrary to the prohibition in s 13(7) is not validly served: see Kitchen Xchange at [46], [50], [51]. It follows that even if the November claim was made in respect of the same reference date, no other payment claim had been served in respect of that date for the purpose of s 13(5)."*

Importantly, the above case confirms that if a head contractor overlooks serving a supporting statement with its payment claim, it is provided with a further opportunity to submit a valid payment claim in respect of an accrued reference date by attaching a valid supporting statement.

***Duffy Kennedy Pty Ltd v Lainson Holdings Pty Ltd* [2016] NSWSC 371**

The second case concerned a construction contract between Duffy Kennedy Pty Ltd (**DK**) and Lainson Holdings Pty Ltd (**Lainson**) made on or about 23 June 2015, for the construction of residential units at Cronulla (**Contract**).

In August 2015, DK (a head contractor under the SOP Act) issued a progress claim to the Superintendent accompanied by a statutory declaration which included a statement that all sub-contractors engaged in works under the contract had been paid in full all moneys due and owing to them.

At [15], Meagher JA considered the prescribed form of a supporting statement set out in the Regulation, noting that:

> *"It requires, among other things, that the statement identify the sub-contractor or sub-contractors with whom the head contractor has contracted; and that it do so either separately, if there is only one or, if there are multiple subcontractors, by listing them in a schedule and describing them either as "subcontractors paid all amounts due and payable" or as "subcontractors for which an amount is in dispute and has not been paid."*

Meagher JA held that the statutory declaration issued with DK's progress claim was not in the form required by the Regulation as it

"*did not identify the sub-contractor or subcontractors with whom DK had contracted*".

The above case confirms that the Courts will strictly uphold the requirements of a supporting statement under the SOP Act, in respect of both form and substance.

If you would like further information about supporting statements and the SOP Act, please contact Brett Vincent or Tanya Lovely on +61 2 9261 5900

NSWCA Upholds Oral Agreement to Lease which was Not Formalised due to Family Honour

In *Doueihi v Construction Technologies Australia Pty Ltd* [2016] NSWCA 105 (12 May 2016), the NSW Court of Appeal held that an agreement to lease not formalised in writing between family members was enforceable, applying the doctrine of equitable proprietary estoppel by encouragement.

Facts

The relevant facts are as follows:

- Mr Hogan had initiated discussions with the four appellant co-owners about them purchasing certain property and then granting a lease to Mr Hogan's business, Construction Technologies Australia Pty Ltd (**CTA**). Three of the four co-owners were Mr Hogan's wife, mother-in-law, and sister-in-law;
- Although the parties had agreed the rent, term, and option periods, the appellant's family practice was to not formalise agreements in writing and to instead rely on 'the honour of the family';
- Mr Hogan and CTA spent almost one million dollars installing plant and equipment in the premises owned by the appellant co-owners;
- In June 2010, Mr Hogan separated from his wife and sought to formalise the lease;
- The co-owners, however, resiled from the previously agreed terms and would only offer CTA a short-term lease, at a 40 per cent increase in rent.

Decision of the Court

The Court applied the principle of equitable proprietary estoppel by encouragement and held that it would be unconscionable for the appellant co-owners to refuse to honour the terms negotiated with Mr Hogan and that Mr Hogan's reliance on family honour in the circumstances was not unreasonable. Their Honours ordered the parties to execute a lease on the agreed terms.

The Court considered that in order for equitable proprietary estoppel to apply:

- there did not need to be any assurance or encouragement by the co-owners or any expectation by Mr Hogan that a 'particular legal relationship', i.e. a lease, would exist. An assumption by the relying party that 'an interest' would be granted is sufficient; and
- a lack of detail, which is a matter of degree depending on the circumstances, will not be fatal. There was sufficient detail in the agreement between Mr Hogan and the co-owners as to the parties, the term and the renal, to establish estoppel.

Implications

Lessors are reminded to carefully conduct their negotiations using words to the effect that "there will be no binding agreement until such time as formal lease documentation is executed by all parties" if that is the intention.

If you would like further information about how to conduct your leasing negotiations, please contact Mike Ellis or Qin Bi on +61 2 9261 5900.

Capital Gains Tax Withholding Regime

From 1 July 2016, purchasers of an interest in Australian property with a market value of $2million or more (usually by reference to the purchase price) will, subject to the comments below, be required to withhold 10% of the purchase price and pay the amount withheld to the Australian Taxation Office (ATO).

The new legislation may have been conceptualised to target foreign residents to ensure compliance with their tax obligations, however the effect of the legislation is that it will apply to all transactions over $2million unless an exemption applies.

Transactions Affected

The new legislation will apply to all transactions entered into on or after 1 July 2016 where the parties agree to sell, transfer or assign:

- any interest in Australian real property;
- any mining, quarrying or prospecting right in relation to resources situated in Australia;
- a 10% or more interest in an Australian entity that predominantly holds any of the above assets (i.e. land rich companies); or
- an option to acquire any of the above assets, and

the market value of the transaction is more than $2million. The $2million threshold is designed to exclude the majority of residential property sales, but note, the legislation aggregates the values if certain conditions are met and two or more contracts may comprise one transaction.

If the transaction is affected by the changes, then the purchaser must withhold 10% of the purchase price (or a lesser amount if

approved by the ATO) and pay the withheld amount to the ATO on or before settlement unless:

- for real property transactions or an indirect interest in real property (such as an interest in a land rich company) the vendor receives a "Clearance Certificate" from the ATO certifying that the vendor is not a foreign resident and provides that certificate to the purchaser before settlement; or

- for other assets, the vendor provides a declaration to the purchaser confirming that the vendor is not a foreign resident for tax purposes. The purchaser will be entitled to rely on this declaration and not be required to withhold any amount.

Transaction Not Affected

The following transactions will not be affected by the new legislation irrespective of whether the vendor is a foreign or Australian resident:

- the market value of the transaction is less than $2million; or

- the transaction is conducted through a recognised stock exchange or alternative trading system; or

- the transaction is already subject to another payment withholding regime; or

- the transaction is part of a lending arrangement; or

- the vendor is under external administration or bankruptcy.

Impact as a Seller

If you are considering selling and unless an exemption applies, then you should obtain a Clearance Certificate from the ATO as soon as possible. The ATO has introduced an automated online process to apply for and issue Clearance Certificates however it may take up to 28 days for a Clearance Certificate to be issued.

The Clearance Certificate is valid for 12 months and will cover all transactions within the 12 month period provided the names on the Clearance Certificate and on the title of the property being sold are the same.

If you are a foreign resident, then the purchaser must withhold 10% of the market value of the transaction and remit that amount to the ATO unless you obtain a variation from the ATO varying the amount to be withheld. If there is a secured creditor, then you should consider whether the sale price less the 10% to be withheld will be sufficient to discharge the debt. If not, then you will need to apply to the ATO for a variation of the amount to be withheld to ensure that the debt can be discharged at settlement.

Impact as a Purchaser

The onus will be on the purchaser to withhold the required amount unless a Clearance Certificate is provided and failure to do so may result in a monetary penalty imposed by the ATO equal to the amount that should have been withheld.

Accordingly, it will be necessary when entering into an affected transaction that the vendor provides a Clearance Certificate or appropriate declarations and warranties confirming the vendor's status as an Australian resident for tax purposes.

As mentioned above, the legislation will apply to options. Existing options which are exercised after 1 July 2016 will be captured by the new legislation as the date of contract for sale and purchase will be after 1 July 2016.

If an option (which is affected by the new legislation) is entered into on or after 1 July 2016 and is subsequently exercised, there are special rules in place to avoid "double counting" on the amount required to be withheld.

If you would like further information about the recent changes to the capital gains tax withholding regime, please contact Mike Ellis or Tuan Nguyen on +61 2 9261 5900.

NSW Stamp Duty and Land Tax Surcharges

On 21 June 2016, the *State Revenue Legislation Amendment (Budget Measures) Bill 2016* was introduced as part of the NSW Government's budget and it proposed certain surcharges in relation to foreign persons acquiring land in NSW. Although the proposed legislation has not yet been passed as law, it is likely to have effect on and from 21 June 2016 assuming it is passed.

Surcharge Purchaser Duty

Under the proposed section 104U of the *Duties Act 1997* (NSW) (***Duties Act***), foreign persons purchasing residential-related property will be obliged to pay a 4% stamp duty surcharge (**Surcharge Purchaser Duty**). The Surcharge Purchaser Duty will apply to specific dutiable transactions in respect of residential-related property (proposed section 104L of the *Duties Act*), including property sales contracts and options entered into on or after 21 June 2016 (**Surcharge Duty Transaction**).

What is a 'foreign person?'

The Surcharge Purchaser Duty will apply to a foreign person within the meaning of the *Foreign Acquisitions and Takeovers Act 1975* (CTH) (**FAT Act**).

What is '*residential-related property*?'

The Surcharge Purchaser Duty will apply to all Surcharge Duty Transactions including agreements for the sale or transfer of residential land in NSW and options to purchase residential land in NSW, declarations of trust and other surrenders and vesting of interest.

Under the proposed section 104I of the *Duties Act,* residential land means any of the following and does not include any land used for primary production:

(a) a parcel of land on which there are one or more dwellings, or a parcel of land on which there is a building or buildings under

construction that, when completed, will constitute one or more dwellings,

(b) a strata lot, if it is lawfully occupied as a separate dwelling, or suitable for lawful occupation as a separate dwelling,

(c) a utility lot (within the meaning of the *Strata Schemes Management Act 2015*), if its use is restricted to the owner or occupier of a strata lot referred to in paragraph (b),

(d) a land use entitlement, if it entitles the holder of the land use entitlement to occupy a building, or part of a building, as a separate dwelling, and

(e) a parcel of vacant land (including any land that the Chief Commissioner is satisfied is substantially vacant) that is zoned or otherwise designated for use under an environmental planning instrument (within the meaning of the *Environmental Planning and Assessment Act 1979*) for residential purposes or principally for residential purposes.

Furthermore, under the proposed section 104K of the *Duties* Act, the definition of residential-related property is any of the following dutiable property:

(a) residential land in New South Wales,

(b) an option to purchase residential land in New South Wales,

(c) an interest in any residential-related property referred to in paragraph (a) or (b), except to the extent that:

(i) it arises as a consequence of the ownership of a unit in a unit trust scheme and is not a land use entitlement, or

(ii) it is, or is attributable to, an option over residential-related property, or

(iii) it is a marketable security,

(d) a partnership interest (being an interest in a partnership that has partnership property that is residential-related property elsewhere referred to in this section).

Assignment of rights under a call option is also a transaction that will be caught by the proposed amendments to the *Duties Act* (**Surcharge Call Option Assignment Duty**). The Surcharge Call Option Assignment Duty will be charged at the same rate as the Surcharge Purchaser Duty which is an additional 4%. Under the proposed clause 121 of Schedule 1 of the *Duties Act*, the Surcharge Call Option Assignment Duty applies in respect of a call option assignment made on or after 21 June 2016.

Further, clause 120(3) of Schedule 1 of the *Duties Act* will be inserted to provide that the Surcharge Purchaser Duty will not apply to transactions that arise from the exercise of an option for the sale or purchase of residential-related property if the option was granted before 21 June 2016. Please note that if an option is transferred after 21 June 2016 (irrespective of whether the right to exercise exists), this type of transaction will incur the Surcharge Purchaser Duty as will any transaction that results from the exercise of an option that has been transferred after 21 June 2016.

'Off The Plan' Stamp Duty Concession

Under the proposed section 49A(3A) of the *Duties Act*, foreign persons buying 'off the plan' will no longer be entitled to defer payment of stamp duty. The amendment will not affect the rights of purchasers who are not foreign persons.

Surcharge Land Tax

As with the proposed amendments to the *Duties Act*, the Surcharge Land Tax has not yet been enacted in Parliament but we anticipate that the bill presented on 21 June 2016 will be brought into effect in its proposed form sometime this year.

Under section 5A(2) of the *Land Tax Act 1956* (NSW) (***Land Tax Act***), all the residential land owned by a foreign person at midnight on 31 December in any year (commencing with 2016) will be charged with an additional 0.75% land tax (**Surcharge Land Tax**). The term 'foreign person' is given the same definition as in the *Duties Act* above.

Under section 5A(4)(h) of the *Land Tax Act*, no threshold will apply to the Surcharge Land Tax. In other words, Surcharge Land Tax will be payable on the full taxable value of land whether or not the foreign person would otherwise be entitled to the tax-free threshold.

Under section 5A(4)(b) of the *Land Tax Act*, if the land is partially owned by a person who is not a foreign person, the taxable value of the land will be reduced to the proportionate value of the interest in the land of the foreign person.

If you would like further information about the NSW stamp duty and land tax surcharges, please contact Mike Ellis or Danny Papadimatos on +61 2 9261 5900.

Developer Rights under Off the Plan Contracts in a Changing Market

In a property market where the prevailing discourse tends towards uncertainty in the sustainability of current real estate prices, developers and their financiers are insisting on stricter terms in off the plan sales contracts to ensure purchasers have less opportunity to rescind.

However, developers and financiers, when updating their off the plan sales contracts, should not lose sight of the unfair contracts regime introduced in 2010 as part of the Australian Consumer Law (ACL) which is set out in Schedule 2 of *Competition and Consumer Act 2010* (Cth).

The unfair contracts regime applies to prohibit unfair terms in "consumer contracts" which are in a "standard form". This article considers the application of the unfair contracts regime to off the plan sales contracts and then proceeds to consider some common terms in off the plan sales contracts which may be at risk of being considered unfair, depending on the circumstances and the contract as a whole.

What is a consumer contract?

Under the ACL, a "consumer contract" is a contract for:

- a supply of goods or services; or
- a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

A contract for the sale of land to an owner-occupier is clearly a "consumer contract".

A contract for the sale of land to an investor, a corporate entity or trust structure may not be considered a "consumer contract".

What is a standard form contract?

The ACL does not definitively prescribe what is a "standard form" contract, however, the Court is obliged to consider:

- whether one party has all or most of the bargaining power;
- whether the contract was prepared by a party before any discussion;
- whether the other party had an effective opportunity to negotiate terms; and
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction.

The presumption is that a contract is in standard form unless proved otherwise.

In the case of off the plan sales contracts:

- bargaining power will, among other things, depend on the property market, i.e. a developer may have greater bargaining power in in a rising property market where demand exceeds supply and less bargaining power in a stagnant property market;
- contracts are prepared by a developer before any discussion takes place with prospective purchasers, however, this is standard industry practice and is furthermore a requirement of s66R of the *Conveyancing Act 1919* (NSW);
- purchasers generally have the opportunity to seek legal advice either before exchanging contracts or after exchanging contracts due to the statutory 5 business day cooling off period, however, developers may not be receptive to significant amendments to the contract as they are under no contractual or statutory obligation to agree to the amendments sought and there is disincentive for purchasers to exercise their statutory cooling off rights to rescind the contract as they will forfeit 0.25% of the purchase price to the vendor; and
- contracts do not generally take into account the specific characteristics of the purchaser and terms are generally dictated by the developer's timeline for construction and its ability to obtain development approval and financing.

It may be a prudent approach for developers to err on the side of caution and take the approach that a Court is likely to find that its off the plan sales contract is a standard form consumer contract, particularly given the presumption to that effect unless disproven.

What is an unfair term?

Under the ACL, a term is unfair if:

- it causes a significant imbalance in the parties' rights and obligations;
- it is not reasonably necessary to protect the developer's legitimate interests; and
- it would cause detriment (whether financial or otherwise) to a purchaser if the term were relied on.

Each requirement must be satisfied for the term to be unfair.

In determining whether a term is unfair, the Court may consider:

- the extent to which the term is transparent, i.e. expressed in plain language, presented clearly and readily available to the purchaser; and
- the contract as a whole.

Once a term is found to be unfair, it is void and the remainder of the contract will continue to apply, if possible.

Common terms in off the plan sales contracts which may be at risk of being considered unfair, depending on the circumstances, include:

- terms which allow the vendor to rescind the contract, for example where the purchaser makes a claim in excess of a specified amount, where the vendor has not commenced construction by a specified date, where the vendor has not completed and registered the strata scheme by a certain date (now addressed in s66ZL of the *Conveyancing Act 1919*) and where the vendor is unwilling to comply with any requirement of a financier, law or planning authority;
- terms which allow the vendor to alter the subject property or the strata scheme;
- terms which allow the vendor to vary the contract by inserting or replacing documents as if they comprised the contract as at the date of exchange;
- terms which restrict the purchaser's ability to terminate or rescind the contract;
- terms which prevent the purchaser relying on representations made by the vendor or agent outside the contract; and
- terms which require unreasonable warranties and indemnities from the purchaser.

Obviously developers need some degree of flexibility to accommodate the uncertainty in dealing with planning authorities, financing, changing laws and construction timelines. However, whether a particular contractual term is unfair depends on the circumstances and the contract as a whole and the matters to which the Court must turn its mind to, as outlined above. For example, a term which adversely affects the purchaser may not be deemed unfair if there is a reciprocal benefit to the purchaser, i.e. a developer may reserve broad rights to amend the subject property, however, if the purchaser has the right to rescind the contract or to make a claim for any reduction in value, then such terms may not be considered unfair.

Developers who have amended their off the plan sales contracts recently to address the changing market ought to review the terms for compliance with the unfair contracts regime, however, it is not an "exact science" and whether or not any particular contractual provision is unfair will depend on the circumstances and the contract, interpreted as a whole.

If you would like further information about your rights under off the plan contracts, please contact Mike Ellis or Qin Bi on +61 2 9261 5900.

Contacts

Brett Vincent
Principal
T: +61 2 9261 5900
E: brett.vincent@vincentyoung.com.au

Mike Ellis
Executive Director – Property & Projects
T: +61 2 9261 5900
E: mike.ellis@vincentyoung.com.au

Craig Young
Legal Practitioner Director
T: +61 2 9261 5900
E: craig.young@vincentyoung.com.au

Martyn Cutler
Manager Claims Consulting
T: +61 2 9261 5900
E: martyn.cutler@vincentyoung.com.au

SUBSCRIBE

If you have been provided with a copy of this newsletter and wish to subscribe to our emailed publications, please click on the Subscribe button above or visit our website: www.vincentyoung.com.au/news/