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Practice Group(s):
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What is a "Material Change" Affecting Off The Plan Sales?

By Justin Lethlean, Rohan Ingleton, Mark McKinley and Julia Baldi

The Supreme Court of Victoria has recently decided a case that highlights a number of issues for off the plan sales and developments in Victoria.

The Court addressed situations where purchasers are entitled to rescind off the plan contracts because of amendments to the plan of subdivision that will materially affect the lot which has been sold.

The decision demonstrates the Court's continuing shift toward protection of "vulnerable purchasers" in property transactions and emphasises the narrow scope for a developer to amend a plan of subdivision without jeopardising existing contracts.

Background

Lockwood v PSP Investments Pty Ltd [2013] VSC 10 (Lockwood) involved a purchaser that entered into eight separate contracts to purchase lots in a development in Windsor. At the day of sale, the plan of subdivision was unregistered. The eight separate contracts related to four apartment lots and four car park lots which were generally in the same form.

After the contracts were signed, the Council required a rooftop lot and the car park lots to become common property, rather than individual lots as shown on the draft plan of subdivision in the contracts of sale. These changes meant that:

- the lot entitlement and lot liability for each of the apartment lots increased by 0.016%
- the four car park lots could not be sold to the purchaser. A 99 year lease was offered to the purchaser by the developer instead, but the purchaser refused that offer and attempted to rescind the contracts.

There was no change to the construction, size or layout of the apartment lots.

As a result of the changes to the plan, and despite the contracts not having anything making the apartment contracts contingent on the car park contracts, the purchaser sought to rescind the contracts for the four apartment lots in accordance with section 9AC of the *Sale of Land Act 1962 (Vic)* (the Act).

Legal Arguments

Section 9AC provides that, for off the plan contracts, vendors must give written notice to a purchaser if there is an amendment to the plan of subdivision.

The purchaser can rescind the contract within 14 days of receiving notice and is entitled to a return of their deposit if that amendment will materially affect the lot that has been sold.

The developer sought to enforce the four residential apartment contracts as the apartment contracts were not interdependent on the car park contracts, and other than an increase to the common property in the development, the apartment lots themselves were not affected by the changes. The developer contended that the "substance of what had been contracted for" had not been altered by the amendments.

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The purchaser argued that the increase in common property and associated owners corporation entitlements was an amendment which materially affected the lot. The Court agreed, and the purchaser was entitled to rescind the contracts and have their deposits returned.

What is Material Effect for the Purposes of Section 9AC of The Sale of Land Act 1962 (Vic)

The Court's decision affirms the earlier case of [Bella Besser v Alma Homes \[2012\] VSC 460](#) (see our previous [Legal Insight in late 2012](#)) and demonstrates the following principles:

- a material amendment need not be detrimental to or adversely affect the lot. Even if an amendment objectively benefits a purchaser, it may be considered material
- section 9AC is designed to protect those purchasing off the plan
- although section 9AC refers to "the lot", the physical lot and the purchaser's rights and entitlements associated with ownership cannot be artificially separated. Amendments which affect a purchaser's rights will also be considered to affect the lot as the "bundle of rights" associated with the land
- it is likely that changes to common property which affect the lot entitlements, affect a purchaser's lot. The Court rejected an analysis based solely on the proportional entitlements and stated that the purchaser's substantive rights which attach to common property must also be recognised
- the threshold is not high for a purchaser to provide evidence for a material change. In some circumstances, purchasers are able to establish a material change simply by producing a copy of the plan of subdivision in the contract and a copy of the amended plan.

Developers should be aware that even seemingly minor and insignificant changes to plans of subdivision may give rise to a purchaser's right to rescind. Plans of subdivision should be carefully considered and finalised as much as possible before contracts are entered into, particularly in reference to common areas and associated rights.

Purchasers of Multiple Lots

The case also raised issues concerning purchasers of multiple lots in a development.

The purchaser argued that the eight separate contracts should be viewed as a single transaction. While this proposition was rejected, the Court found that it would be "entirely artificial" to deal with each contract in isolation of the other. Although each lot was subject to a separate contract, it was considered that the contracts and the investment by the purchasers related to the development project as a whole.

In this development, the purchaser had entered into contracts to purchase four of only 10 car parks in the development. It was held that "ordinary common experience" lead to a conclusion that the car parks would enhance the value of each apartment, and the fact that the vendor was unable to complete the car park contracts therefore materially affected the apartment lots.

The Court emphasised that in assessing materiality, the whole development and context of what the purchaser has invested in, including the development scheme and arrangements, must be taken into account.

The decision suggests that purchasers of multiple lots may find it easier to establish materiality when a plan of subdivision is amended. Developers should note that there may be an increased

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risk in relation to purchasers that buy multiple lots and are seen to invest in the development as a whole.

Conclusions

Section 9AC of the Act provides significant protection for purchasers in off the plan sales. Developers should be mindful of their obligations under the Act and seek to make as few changes as possible to plans of subdivision after contracts of sale have been entered into in order to avoid situations which allow for the rescission of contracts.

Authors:

Justin Lethlean

justin.lethlean@klgates.com
+61.3.9640.4312

Rohan Ingleton

rohan.ingleton@klgates.com
+61.3.9205.2012

Mark McKinley

mark.mckinley@klgates.com
+61.3.9205.2168

Julia Baldi

julia.baldi@klgates.com
+61.3.9640.4212

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