

2022 Property Law Afternoon

Where to now: Can you
still rescind an off the plan
contract in the ACT?

Alfonso Del Rio,
Clayton Utz

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WHERE TO NOW? CAN YOU STILL RESCIND AN OFF THE PLAN CONTRACT IN THE ACT?

Amendments to the Civil Law (Sale of Residential Property) Act

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Alfonso del Rio

ACT Law Society Property Law Afternoon
16 March 2022

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OVERVIEW

- ▶ **Recap on ACT & NSW off-the-plan rescissions**
 - » Statutory rights (ACT)
 - » Statutory rights (NSW)
 - » Other rescission rights
 - › Seller's contractual rights to rescind before sunset date (NSW)
- ▶ **Reform of ACT seller rescission rights**
 - » *Civil Law (Sale of Residential Property) Act 2003 Pt 2A*
 - » Rescission event
 - » Court application
 - » Buyer's rights unaffected
 - » Legal costs/ damages
- ▶ **Where to now ...**

RECAP - ACT OFF-THE-PLAN RESCISSIONS

- ▶ **Statutory rescission rights (Limited Selection only)**
- ▶ Type 1/ Type 2 material changes (*Civil Law (Property) Act*, Div 2.9.2)
 - » Type 1 matter – no need to show significant prejudice
 - » Type 2 matter – need to show significant prejudice
- ▶ Breach of implied warranty(*Civil Law (Property) Act*, Div 2.9.3)
 - » Warranty of accurate disclosure statement
 - » Warranty of no issues likely to prejudice the purchaser
- ▶ Additional rescission right for residential buyers: Breach of statutorily included conditions (*Civil Law (Sale of Residential Property) Act*, s 11)
 - » Error in the description of the property "that is material" – buyer may rescind (s 11(h))

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RECAP - NSW OFF-THE-PLAN RESCISSIONS

- ▶ **Statutory rescission rights**
- ▶ For residential purchasers (buyers):
 - » Inaccuracy in relation to a material particular (*Conveyancing Act*, ss 66ZN-66ZP)
 - › Material particular (s 66ZL(1))
- ▶ For residential vendors (sellers):
 - » Vendor gets a rescission right if '**a sunset event does not occur by sunset date**' (*Conveyancing Act*, s 66ZS)
 - › **Sunset event:** creation of the lot OR issue of the certificate of occupancy (66ZS(1))
 - › Vendor needs to apply to the NSWSC to rescind (covering purchaser's costs if consent unreasonably withheld)
 - › "just and equitable" to rescind

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RECAP - OTHER RESCISSION RIGHTS

- ▶ **Statutory rights:**
 - » **Australian Consumer Law s 30**
 - › "false or misleading representations" (not our topic today)
- ▶ **Buyer's contractual rights to rescind (*Flight v Booth* principle)**
- ▶ **Seller reserves contractual rights to rescind before sunset date**

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FLIGHT V BOOTH – BUYER RESCISSION

- ▶ ***Flight v Booth* (1834) 1 Bing NC 370; 131 ER 1160**
 - » Buyer is not required to accept a property that is substantially or materially different from that which they contracted to buy
- ▶ ***Kalathas v 89 Ebley Street Pty Ltd* [2021] NSWSC 490**
 - » Off-the-plan purchase of a lot in Bondi Junction
 - » Draft strata plan: 2 car spaces in Lot 1 (included in the Contract)
 - » Registered strata plan: no car space in Lot 3
 - › Change in lot number AND no car space
 - › Vendor insisted on selling Lot 3 to the Purchaser based on registered strata plan
 - » Court found the Purchaser was entitled to rescind under *Flight v Booth*
 - › Good for the Purchaser as she had difficulty with obtaining finance to perform the Contract
- ▶ ***Victorsen v Easy Living Holdings Pty Ltd* [2019] NSWSC 1721**
 - » Townhouse with outdoor turf area promised got detention tank and timber deck
 - » Rescission upheld – 'building' in special condition included outdoor turf area (representation prior to entry into contract)

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NSW SELLER RESCISSION BEFORE SUNSET DATE

- ▶ **Sunset events:** creation of subject lot/ issue of occupancy certificate
- ▶ **Seller can reserve rights to rescind (other than sunset events):**
 - » Subject to becoming registered proprietor
 - » Subject to development approval
 - » Subject to finance
 - » Other delays perhaps where beyond seller's reasonable control ...
- ▶ **In the ACT Sellers rarely exercised these rights**
 - » DA Approval being an exception

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NSW "RESCISSION EVENT" - SUNSET EVENT

- ▶ **Seller can rescind if a sunset event stated in the contract does not occur by sunset date:**
 - » **Sunset date:** a date the sunset event must happen (set out in contract)
 - » **Sunset event:** a range of registration/ issue of certificates (s 19A)
 - › (a) for the sale of a unit for residential use—the registration of the units plan for the unit; or
 - › (b) for the sale of a residence—the issue of a certificate of occupancy for the residence; or
 - › (c) for the sale of vacant land for residential use—the registration of the Crown lease for the land; or
 - › (d) the issue of a certificate of occupancy in relation to the unit; or
 - › (e) the issue of a certificate of compliance for the Crown lease for the unit or land; or
 - › (f) an event prescribed by regulation
- ▶ **c.f. NSW: sunset event means "creation of the subject lot, the issue of the occupancy certificate" (66ZS(1))**

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THE MESS WE MAKE – S 66ZS

▶ *Paolucci v Makedyn Pty Ltd* [2020] NSWSC 1871

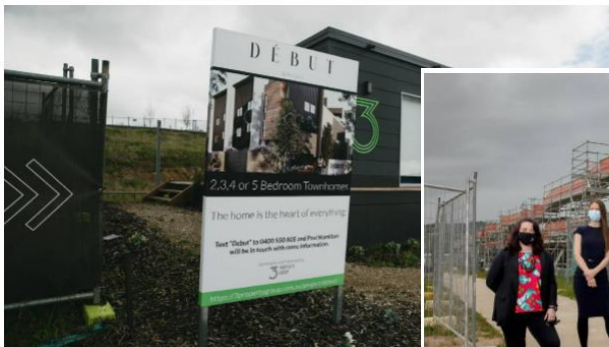
- » Purchaser entered into a reconveyance contract to buy back the land she sold to the Vendor for construction of 2 dwellings on the land
- » The subject lots (there were more than 2) were not registered until 1 year after the sunset date
- » Purchaser claimed for damages due to the delay
- » Vendor cross-claimed for an order to rescind the reconveyance contract
- » Court did not grant rescission because it did not consider it just and equitable because:
 - › Lots now registered
 - › Nothing to prevent the Vendor from completing the Contract
 - › Rescission of the reconveyance contract would deprive the Purchaser of her land completely
 - › Order made to reconvey the land without the dwellings constructed at no cost
 - › No order for specific performance of the the building of the dwellings

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ACT REFORM RESIDENTIAL VENDOR RESCISSIONS

- ▶ Reform prompted by 3 Property Group rescissions (Debut)



Some buyers have had their contracts rescinded by 3 Property Group development, located in Wright. Picture: Dion Georgopoulos

Credit: Canberra Times



Lawyer Rahul Bedi, front, with clients Sheridan Burnett, Olga Zautner, Wasantha Davidlage, Reece Peart, Mohammad Choudhury and Song Le, who have all had their contracts cancelled by 3 Property Group. Picture: Sithixay Dittthavong

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CIVIL LAW (SALE OF PROPERTY ACT) **PART 2A – "OFF-THE-PLAN CONTRACTS"**

- ▶ **Part 2A "Off-the-Plan Contracts" (effective 9 November 2021)**
 - » What time?
- ▶ **Off-the-Plan Contract is a Contract for Sale of**
 - » Unit before units plan registered
 - » Residence (not a unit) before CoO issued
 - » Vacant Land for residential use before Crown Lease registered
- ▶ **Agreement to grant crown lease is not a contract for sale**

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CIVIL LAW (SALE OF PROPERTY ACT) **PART 2A – "OFF-THE-PLAN CONTRACTS"**

- ▶ **"Rescission under rescission provision" (s 19B)**
- ▶ **Rescission provision (s 19A)** means a provision in the off-the-plan sales contract that states the contract is rescinded if:
 - » A ***sunset event*** does not occur by ***sunset date***; or
 - » A ***delay event*** occurs
 - » As prescribed by regulation (nothing prescribed as yet)
 (collectively defined as "**rescission event**" (s 19D(6)))

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"RESCISSION EVENT" - SUNSET EVENT

▶ **Sunset event**

- » (a) for the sale of a unit for residential use—the registration of the units plan for the unit; or
- » (b) for the sale of a residence—the issue of a certificate of occupancy for the residence; or
- » (c) for the sale of vacant land for residential use—the registration of the Crown lease for the land; or
- » (d) the issue of a certificate of occupancy in relation to the unit; or
- » (e) the issue of a certificate of compliance for the Crown lease for the unit or land; or
- » (f) an event prescribed by regulation.
- » **Reminder - NSW: sunset event means "creation of the subject lot, the issue of the occupancy certificate" (66ZS(1))**

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"RESCISSION EVENT" - DELAY EVENT

▶ **Delay event:**

- » (a) means any event delaying or preventing completion of the contract including—
 - › (i) an event delaying or preventing the construction of a building or other related works; and
 - › (ii) a delay in obtaining any approval, registration, permission, exemption, insurance or any other thing necessary for completion of the contract; but
- » (b) does not include—
 - › (i) an event delaying or preventing completion of the contract that the buyer has caused or substantially contributed to; and
 - › (ii) an event prescribed by regulation.
- ▶ **This can include any delay leading up to registration of the unit:**
 - › failure to own land/ obtain DA/ obtain finance/ commence construction/ complete construction
- ▶ **NSW does not have a 'delay event'**

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"RESCISSION EVENT" - COURT ORDER TO RESCIND

- ▶ **Rescission provision does not automatically rescind the contract on sunset event/ delay event (s 19E)**
 - » To effect rescission, a seller may apply to the Supreme Court for an order allowing the seller to rescind the contract (s 19D(1))
 - › It is a discretion by the seller
 - › But there is no other avenue to effect rescission (rescission provision only operates to effect rescission **in accordance with Part 2A** – s 19E(1)(b))
 - › In practice - a seller who wants to rescind will have to apply to the Supreme Court
 - » **The Supreme Court must not make the order unless the seller satisfies the Court that it is just and equitable to make the order (s 19D)**

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"JUST AND EQUITABLE" – S 19D(3)

(3) In deciding whether it is just and equitable to make the order, the Supreme Court must take into account the following:

- ▶ (a) the terms of the off-the-plan contract, including whether a term is intended to avoid the operation of this part;
- ▶ (b) whether the seller has acted unreasonably or in bad faith;
- ▶ (c) whether factors beyond the seller's reasonable control have affected the seller's ability to complete the contract or the viability of the seller's business (e.g. disruption of supply/ inability to retain finance);
- ▶ (d) what reasonable actions the seller has taken to—
 - » (i) avoid a rescission event; or
 - » (ii) if a rescission event has happened—minimise the effect of the event on the seller's ability to complete the contract;
- ▶ (e) whether there is a reasonable prospect of the seller completing the contract;
- ▶ (f) whether the unit or land the subject of the contract has increased in value;
- ▶ (g) the effect of the rescission on the buyer;
- ▶ (h) whether the buyer has been performing their obligations under the contract;
- ▶ (i) the effect of completing the contract on the seller;
- ▶ (j) any other matter that the court considers relevant;
- ▶ (k) any other matter prescribed by regulation.

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BUYER'S RIGHTS UNAFFECTED

- ▶ Buyer can rescind under the contract without applying to the Court
 - » "This section does not affect any right that a buyer under an off-the-plan contract may have to rescind the contract" (s 19E(2))

- ▶ Why not take away Buyer's rights to rescind

- ▶ Unfair contract terms / Australian Consumer Law
 - » A term that effectively permits one party (but not another party) to avoid or limit performance of the contract Terms that permit a business to avoid or limit meeting its obligations under a contract ...

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LEGAL COSTS FOR SELLERS – S 19D(4)

- ▶ (4) The seller must pay the costs of the buyer in relation to a proceeding for the order
 - » unless the seller satisfies the Supreme Court that the buyer **unreasonably withheld consent** to the rescission of the off-the-plan contract under the rescission provision.

- ▶ **Is it unreasonable to withhold where**
 - » **Prices have gone up**
 - » **Costs incurred (finance and legal)**
 - » **Loss of Government concessions**

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LEGAL COSTS FOR SELLERS UNREASONABLY WITHHELD?

- ▶ "unless the seller satisfies the Supreme Court that the buyer **unreasonably withheld consent** to the rescission of the off-the-plan contract under the rescission provision"
 - » What does this mean?
 - » Price goes up?
 - » Application fee?
 - » Legal fee for conveyance?
 - » "Make good" of buyer's losses? (note: the Court can order additional damages)
 - › (5) The Supreme Court may, in dealing with an application made under this section, make any other order, including an order for damages, that the court thinks fit.

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SUMMARY

NSW	ACT
Vendor may be able to rescind on a sunset clause without a Court order for failure to:	Seller can rescind on a rescission provision without a Court order for:
<ul style="list-style-type: none"> • become registered owner • be granted development approval • obtain finance • commence construction 	???
Vendor must apply to the Court (and pay parties' costs) to rescind for:	Seller must apply to the Court (and pay parties' costs) to rescind for failure to:
<ul style="list-style-type: none"> • the subject lot not being created • the occupation certificate not being issued 	<ul style="list-style-type: none"> • become registered owner • be granted development approval • obtain finance • commence construction • the subject unit not being registered • (and more! "sunset event" + "delay event")

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WHAT NOW?

- ▶ Overall, Part 2A is more buyer-protective than 66ZS (NSW)
- ▶ Buyer can rescind at any time
- ▶ Seek to limit Buyer's rights to rescind
 - › E.g. "in any event if the Units Plan has not registered by **30 June 2024** then either party may rescind **within the 14 day period immediately following that date** (i.e. by no later than **15 July 2024**) this Contract and the provisions of clause 21 will apply."
- ▶ Any other option ...

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Questions?

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TODD RUNDGREN “Can We Still Be Friends?”

Rescind?

Credit:
cherrystereo.com

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LYRICS (APOLOGIES TO TODD)

- ▶ We can't play this game anymore, but Can we still **rescind?**
Things just can't go on like before, but Can we still **rescind?**
- ▶ We had something to learn **(NSW)**
Now it's time for the wheel to turn
Things are said one by one Before you know it's all gone
- ▶ Let's admit we made a mistake, but Can we still **rescind?**
Heartbreak's never easy to take, but Can we still **rescind?**
- ▶ It's a strange sad affair Sometimes seems like we just don't care
Don't waste time feeling hurt We've been through hell together
- ▶ La la la la, la la la la
Can we still **rescind?**
Can we still get together sometime?
- ▶ We awoke from our dream Things are not always what they seem
Memories linger on It's like a sweet sad old song

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