

An off the plan Contract for the Sale of Land will normally include a provision allowing either the vendor or the purchaser to rescind the Contract if the building/plan has not been registered by a set date. This provision is known as the sunset clause.



A. OFF THE PLAN PROPERTIES

Buying off the plan is when the property is advertised for sale and sold before they have been built. There are some clear risks when buying off the plan as compared to buying an existing property. Some of these risks are that the developer may vary the design of the property without the purchaser's approval, the finished property and quality of work may not be what was envisioned and of course there may be delays in completion due to poor weather or further planning approval required.

However, there are also benefits to buying off the plan. Aside from owning a brand new property, some advantages include being able to lock in the price even though it will be completed in the future, securing a high value capital with a small deposit where the balance is not paid until much later, allowing for more time to save, potential for capital growth, tax advantages by claiming depreciation and stamp duty savings.

The Contract for an off the plan property is often much more complex than for an existing property. This is because it needs to take into account many variables, for both the vendor and the purchaser during the construction process. It is critical that you engage a lawyer to review the contract to ensure the contract is reasonable to a purchaser.

B. WHAT IS A SUNSET CLAUSE?

Off the plan contracts are conditional contracts which require some mechanism to allow the contract to be terminated if the development is not finished. A sunset clause is a provision which provides for the maximum time in which the developer has to finish a project. The sunset date is not an indication of the length between exchange of contract and completion. The sunset date will always be a certain period after the expected development completion date, to allow additional time to complete construction should there be any delays. The period of time varies across developments, depending on their size. Often, there will also be a clause which allows the sunset date to be extended should there be events beyond the control of the developer. The request for extension should be accompanied by a surveyor report evidencing the reasons of the delay.

The sunset clause exists to provide certainty to both the purchaser and the vendor of the period of time which the parties are obligated to be bound by the contract. It is important to remember that the sunset clause not only protects the interest of the vendor but also the purchaser.

For instance, while the contract is on foot, the deposit put on the

property (usually 10%) is not released to the vendor. This means more often than not, it is in the interest of the vendor to complete the project on time so that they can be paid. Additionally, there is little gain for the developer to rescind the contract as the windfall profit may not offset the increased costs associated with construction delays. Further, a court dispute over an alleged "sunset clawback" can also greatly damage the reputation of the developer. So even if the developer may gain some windfall, the long term damage can be much more harmful.

C. LEGISLATIVE CHANGES

The NSW Government has passed legislation to strengthen customer protection in off the plan Contracts. Under the new law, the vendor must give the purchaser a notice in writing of at least 28 days prior to rescission under a sunset clause. The notice must state why the vendor is proposing to rescind and give reasons for the delay. If the purchaser does not give written consent to the vendor's proposed rescission, the vendor must obtain an order from the Supreme Court of NSW permitting the rescission. The Court, in determining whether it is just and equitable to make the order must take into account the following factors:

- The terms of the contract;
- Whether the vendor has acted unreasonably or in bad faith;
- The reason for the delay;
- The likely date on which the strata plan will be registered;
- Whether the property has increased in value;
- The effect of the rescission on the purchaser;
- Any other matter that the Court considers to be relevant;
- Any other matter prescribed by the regulations.

The vendor is responsible for paying the purchaser's costs of the application to the Court, unless it can be shown that the purchaser's refusal to consent to the rescission was unreasonable.



D. WHEN SHOULD CONSENT NOT BE GIVEN?

The purchaser should not give consent and object to the granting of the order permitting rescission if there has been a breach of contract. Most sunset clauses provide that the vendor will use reasonable endeavours to obtain registration of the plan. This prevents the vendor from causing delay deliberately or inadvertently. However, if the plan is not registered by the sunset date and the vendor has used reasonable endeavours, the vendor (and the purchaser) may rescind the contract. The question that has the most weight is whether the vendor did in fact use reasonable endeavours, that is, did it do everything it could to get the plan registered and whether any act or omission of the vendor materially contributed to the non-registration of the plan.

As the vendor is in total control of the plan registration process, the vendor has an implied and in fact express responsibility to genuinely use reasonable endeavours if it wishes to rely on the sunset clause to rescind the contract. The purchaser should also provide evidence of what delays had been caused by the vendor's failure to exercise reasonable endeavours to meet the sunset date.

In off the plan contract, the words "reasonable endeavours", "all reasonable endeavours", "best endeavours" can be used interchangeably. While it does not make any significant difference on the developer's obligations, the words "reasonable endeavours" are said to have a slightly lower threshold than "all reasonable endeavours" and "best endeavours". The dominant interpretation of "best endeavours" is that it requires a person to do all they reasonably can to achieve the contractual object but it does not require a person to go beyond the bounds of reason.

E. RESULT OF RESCISSION

If consent is given or an order permitting the rescission is granted, clause 19 of the standard form Contract for the Sale of Land applies. The purchaser is entitled to re-claim the deposit paid and interest accrued in full but will be out of pocket for their costs and may be priced out of buying a replacement property.

F. TIPS ON AVOIDING THE SUNSET CLAUSE TRAP

Even with the current property market, developers breaching the sunset clause is still a rare occurrence. However below are some tips to help you avoid having to get into these situations.

F.1. REASONABLE ENDEAVOURS

Contracts that do not provide for the words "reasonable endeavours" or something similar to that effect should not be entered into. This type of contract takes away all the rights of the Purchaser.

F.2. EXTENSION OF SUNSET DATE

If the contract does not provide for an extension of sunset date, you may wish to request the vendor to include a clause to this effect, or

alternatively, a clause which provides you a right to extend the sunset date should the developer encounter delays.

F.3. RESEARCH ON THE DEVELOPER

As with all property purchases, research is key. A prospective purchaser should research on the developer and make sure they have a good track record and are a trusted presence in the industry. It is important to make sure they are a reputed developer who has had a successful development in the past.

F.4. DEVELOPMENT CONSENT

More often than not, obtaining development approval from the council can take up a majority of the developer's time, particularly if it is required before construction can begin. Contracts that have been rescinded under the sunset clause have often sought to rely on the fact that development approval took longer than usual to be granted. When entering into an off the plan contract, it may be necessary to research and determine what stage the development consent is at and whether the developer is on track.

F.5. YOUR RIGHTS WHEN THERE IS A BREACH

You should ensure the contract still protects your rights in the event there may be a breach of the sunset clause. The contract should not limit the purchaser's right to claim damages when the vendor rescinds the contract.

Though hard to imagine, there may be opportunity for the developer to offer the purchaser a trade-off, where the purchaser pays an increased price to cover the extra costs associated with the delay in construction, for the developer not to rescind the contract. This is a commercial decision that must be negotiated between the vendor and the purchaser.

Comasters is able to assist a purchaser in reviewing an off the plan Contract and provide advice in general on the Contract and specifically on the implication of sunset clauses. Comasters is also able to assist a Vendor by drafting a development Contract

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