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NEWS

Developers beware: material changes to off the plan contracts

A recent case sends a warning to developers that variances of less than 5 percent in area of off the plan lots can be a material prejudice.

When entering off the plan contracts, it is commonly accepted by developers and buyers that a variation of 5 percent or less in area does not materially affect the lot sold. However, the recent Victorian Supreme Court decision in *Burger v Longboat Holdings Group2 Pty Ltd (Burger)* challenges this concept with the Court finding a reduction in size allowed the buyers to terminate their contract.

What does this case mean for the future of the 5 percent tolerance clause in off the plan contracts?

A CAUTIONARY TALE

Whilst this case was heard in Victoria, it does serve as a cautionary tale about developers' disclosure obligations and highlights that despite contract terms to the contrary, a variation of less than 5 percent may be material and give rise to a buyer being able to rescind their contract or claim compensation.

In Queensland, the Body Corporate and Community Management Act permits a buyer to terminate a contract within 21 days of receiving notification of changes in the disclosure statement given prior to entering the contract if they would be materially prejudiced by the changes.

In New South Wales, buyers have a right to rescind contracts or make a claim for compensation under the Conveyancing Act if material changes are made to documents forming part of the disclosure statement.

In Victoria, the Sales of Land Act permits rescission of an off the plan contract by the buyer within 14 days of being advised by the seller of an amendment to the plan of subdivision which will materially affect the lot to which the contract relates.

BUT THE CONTRACT SAYS VARIANCES ARE ALLOWED. SO WE ARE GOOD?

None of these legislative provisions refer to 5 percent variances. However, it is common for off the plan contracts to contain clauses providing variances in areas will not entitle buyers to terminate their contracts. In fact, the contracts signed by the Burgers contained a condition which stated 'the purchaser acknowledges and agrees that an amendment made to the plan which alters the area of the property by 5 percent or less will not be regarded as an amendment which materially affects the

property'. However, the inclusion of this condition did not negate the test of whether a change materially affects the property being purchased as the contracting parties cannot contract out of legislative rights afforded to buyers.

Whilst the laws in relation to off the plan sales vary across Australia, the Burger case highlights the courts' discretion when considering contractual conditions allowing for tolerances in areas.

THE BURGER CASE

A summary of the facts is as follows:

- The buyers contracted to buy two separate lots of similar size, shape and boundaries in an off the plan development.
- The buyers sought to rescind their contracts after the developer gave them an amended plan which included a total reduction in size of slightly less than 5 percent of the size of the property from 95m² to 91m². The developer refused to accept the rescission and refused to refund the deposits.
- The buyers instituted proceedings asking the Court to determine whether the contracts had been validly rescinded.
- The buyers' claim was based on several changes they considered to be material. The developer argued a 5 percent reduction in the size of a lot is generally tolerable and not material.
- The Court considered each change showing the amended plans separately and ultimately held the rescissions were valid.
- The changes considered material by the buyers were:
 - A change to the configuration and reduction in the size of the master bedroom resulting in the reduction in the size of the lots by 4m² (or approximately 4.4 percent).
 - Changes to the light court outside the master bedroom, which resulted in a reduction of natural light available in the master bedroom.
 - Creation of a council reserve over an area of land previously disclosed as being common property.
 - A roof terrace on common property being reallocated to a different owners corporation which meant the purchasers could no longer access or use the roof terrace.
 - Changes to the area and location of car parks allocated to the lots being purchased.

THE BURGER DECISION

The Court said while the reduction to the master bedroom was only 4.4 percent, the reduction equated to around a quarter of the total size and created unusable space in the room. This, combined with the impact of the light reduction to the master bedroom, meant the lot had in fact been materially affected. The Court also accepted the buyers' argument that the changes to the common property, and the loss of the buyers' right to use and enjoy such areas, was also material. On these grounds, the buyers were entitled to rescind the contract. Notably, the Court did not consider the changes to the car parks to be material as they did not impact the utility of the car park. The buyers would not have been entitled to rescind on that basis alone.

WHAT DOES THIS ALL MEAN?

It is unlikely we will see an end to tolerance clauses in off the plan contracts. However, the Burger case serves as a warning to developers of the consequences of failing to consider the practical impacts on buyers by reducing the size of a lot or making other changes to plans and specifications after contracts have been entered into.

Developers should be aware the long-accepted 5 percent tolerance may not always be a sufficient marker for assessing material change and the courts will consider whether changes are material on a case-by-case basis and, in addition to other factors, will have regard to the useability and utility of the affected property. In *Burger*, the variance was less than 5 percent, but it was to the master bedroom and it had the effect of reducing natural light and made the movement of furniture more difficult. The contract condition allowing for 5 percent variances did not help the developer in this case.

Well drafted clauses to address changes to disclosure material, plans and specifications during the construction process may go some way to narrowing the ability of buyers to terminate. The risk of contract rescissions may not be able to be eliminated completely, but can be minimised by—

- ensuring proposed plans and specifications are as final as possible before going to market
- keeping changes to a minimum
- ensuring compliance with any statutory or contractual timeframes relating to giving further disclosure and/or amended plans to buyers
- notifying buyers of changes early on to manage the possible impact of those changes, including impact on pre-sale numbers and possible breaches of development funding conditions.

Legal advice should always be obtained to manage risk when considering any potential variations to off the plan lots.

For buyers, it is important to carefully review any changes as soon as you receive notification from the developer and seek legal advice if you have any concerns or if you want to investigate rights to rescind your contract.

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