Legalwise – Property Law Conference

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Three Recurring Drafting Issues for Property Lawyers

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ISSUE 1. SPLIT DEPOSITS

1. The place to start is the contract. Usually, the standard form of contract governs what happens with the deposit upon certain events occurring e.g. termination and rescission**.**

E.g. Clause 9 of the 2005 edition, which says that the vendor can terminate if the purchaser does not comply with the contract in an essential respect, and in that event can retain up to 10% of the deposit.

2. The cases below show that what needs to be avoided is exposing one's client to any argument that the split deposit provisions, are a penalty. If a penalty, then the money can be clawed back, to the extent it is penal. It is a matter of construction whether a second or further payment prior to completion is part of the deposit, or something else, e.g. payment towards the purchase price.

Litigation including an interim injunction might prevent the vendor accessing the deposit (or making a call for a further instalment, until further order).
That might throw the spanner in the works of any deal the vendor has in the pipeline: buying its own property, or migrating to an island paradise.

3. Against these legal pitfalls, one must weigh commercial considerations e.g. a vendor desirous of selling, and a purchaser who can only come up with an acceptable deposit when Greenacre is sold and Blackacre is refinanced (which of course, will occur on different days in different cities), and come up with an

acceptable risk profile for each particular circumstance.

4. *Lessons of the cases below are as follows*:

i. A provision requiring a 5 per cent deposit to be topped up to 10 per cent *on default* is arguably void as a penalty;

ii. a provision where the second instalment of a deposit is payable upon *settlement*, cannot bear the character of an earnest for performance , and is probably a penalty;

iii. Ensure harmonisation of the standard conditions and special conditions;

iv. Ensure harmonisation between the various special conditions, where they deal with the deposit (and of course, generally);

v. Beware clauses where the right to receive a payment arises on the happening of any number of events, *some* only of which are breaches of contract and *some* of which are not;

vi. "……The exception from the law relating to penalties relates and relates only to deposits, that is, to payments which truly have the character of earnest money paid on or in relation to entering into the Contract, and although provisions of contracts almost always establish what the deposit is, it is not open to parties to avoid the operation of penalties law by designating a payment or an obligation as a deposit if it does not otherwise have that character": *Luu v Sovereign Developments Pty Limited* (supra) at [24], and *Iannello v Sharpe* [2007] NSWSC 61; (2007) 69 NSWLR 452 at [31]).

What is the function of a deposit? How is it different in character to a penalty?

5. A deposit is considered an 'earnest' of the bargain or its performance (*Brien v Dwyer* [1978] HCA 50; (1978) 141 CLR 378 at 385) that is designed to demonstrate the sincerity of the contracting party who is to pay it. In *Brien*, Jacobs J described a deposit as:

'an assurance to the vendor, a security to him pending completion. He can take his property off the market and not concern himself with other offers in case the sale should go off, with the comfort at least that the deposit is there for his security.'

This reasoning is no less applicable to contracts providing for the payment of a

deposit in particular instalments at times each stated to be essential. That is the present case. Further, **Brien** is authority for the proposition that once there has arisen an entitlement to rescind for failure to pay the deposit, that entitlement may be exercised without the necessity that the purchaser first be given notice requiring payment to be made at a reasonable time.

6. For that reason, it is ordinarily beyond the reach of equitable relief against penalties or forfeiture, at least if it is not excessive or unconscionable in amount, of which in Queensland the equivalent of 10 per cent of the purchase moneys is ordinarily considered the upper limit: *Freedom v A.H.R. Constructions Pty Ltd* [1987] 1 QdR 59.

The payment of a deposit, as opposed to the payment of instalments towards the purchase price, is not conditional upon completion:

"The [vendor's] title to the instalments whether actually received or whether due and payable is conditional upon completion, ie, upon the executory consideration becoming executed. This is not so in the case of a deposit, the payment of which is in no way conditional upon completion and which is the absolute property of the seller if received." *Farrant v Leburn*…….

7. A clause which provides that a sum certain be paid in the event of default, or on the occurrence of a particular event; or is forfeited on the happening of a particular event, is a valid liquidated damages clause so long as it is a genuine pre estimate of damages. But if the sum to be paid (or forfeited) is wholly disproportionate to any possible loss, it then is a penalty,

If upon a true construction of the contract, it can be said that the true purpose of a clause is to coerce a party into compliance with their contractual obligations, then it can be said to be *in terroren* and more arguably, a penalty.

8. In *Andrews v Australia and New Zealand Banking Group Limited* [2012] HCA 30; (2012) 247 CLR 205 , the HC held at [10] that:

"In general terms, a stipulation prima facie imposes a penalty on a party ("the first party") if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to

satisfy the collateral stipulation."

9. The approach to the task of assessing whether a contractual provision is penal was recently described by Allsop CJ (with whom Besanko and Middleton JJ agreed) in *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50 at [95]- [96] as follows:

"95 …….the task of the court is to assess whether the clause in question is penal in character. …… the secondary stipulation is, as a matter of substance, *collateral or accessory to a primary stipulation in favour of the obligee and upon failure of which, the secondary stipulation imposes an additional detriment for the benefit of the obligee*: Andrews (HC) at [10]; *the secondary stipulation is in the nature of security for, and in terrorem of, the satisfaction of the primary stipulation:* Andrews (HC) at [10]; and (as an essential element) *the secondary stipulation imposes an additional detriment that is out of all proportion to the loss suffered by the obligee on the failure of the primary stipulation or that is inordinate or extravagant or oppressive: Ringrow* [2005] HCA 71; 224 CLR 656 at [21], [28], and [32]. The adjectival description of the disproportion varies in expression in the cases, but for present purposes "extravagant", "exorbitant", "oppressive", "inordinate" and "unconscionable" can be seen to be broad synonyms: see Ringrow at 667 - 669, [26] - [32]. The question is to be assessed as at the time of entry into the contract. It is not a mechanical task."

See generally my book *Commercial Damages*, Thompson Reuters (loose leaf) Ch13; and also the recent discussion by Darke J in paras [30] ff of *Sydney Developments Pty Limited v Perry Properties Pty Limited* [2016] NSWSC 515.

So the draftspersons' challenge with split deposits is to walk a pathway within the forest of earnestness, and not stray into the minefield of coercion.

Cases on split deposits

10. *Rana v Dalla Costa* [2014] NSWSC 1113 was an appeal as to whether the second payment of a split deposit constituted a penalty or not. Harrison As J had the occasion to review and summarise a long line of cases dealing with split deposits, from *Ashdown* onwards, and what follows is a series of lightly edited extracts from her Honour's with respect, excellent case summaries.

11. HH held that the question of whether the second $25,000 was a deposit or a penalty turned on how it was to be characterised under the contract, which is a question of construction to be decided upon by the terms and inherent circumstances of the contract, judged as at the time of the making of the contract, not as at the time of the breach.

The second payment was due 70 days after the date of the contract, which was 140 days or just over 4 months prior to the completion date. Harrison As. J held that payment of this second sum would have enabled the purchasers to further demonstrate their earnest in complying with the contract and completing the purchase by the later date that was stipulated; and thus was properly characterised as a deposit.

The point of distinction from *Iannello* and *Boyarsky* was the timing of the second payment. In coming to this conclusion, HH analysed some of the cases below.

Ashdown v Kirk [1997] 2 Qd R 12

12. In *Ashdown*, the Court of Appeal of Queensland enforced a provision in a contract for the sale of land that provided for a split deposit to be paid by two instalments. The contract provided for $50,000 to be paid 180 days from the signing of the contract and $200,000 to be paid 360 days from the signing of the contract. The purchasers failed to pay the first instalment of the split deposit and the vendors terminated the contract. Clause 13.3 stipulated that if the vendor terminated the *contract " ... the vendor may recover from the Purchaser as a liquidated debt the deposit or any part of it which has not been paid by the Purchaser."*

The issue before the Court was whether the whole of the unpaid deposit could be recovered. The Court held that under clause 13.3 of the contract, there was no basis for distinguishing between the $50,000 already payable when the contract was determined and the $200,000, which had not yet became due and payable at the time of that determination.

It was also held that both sums were recoverable as liquidated damages.

13. In *Ashdown,* McPherson JA stated at p8:

"There is therefore no conflict or inconsistency between the provisions of Standard Condition cl. 13.3 prescribing the consequences of termination of the contract, and those of Special Condition 3, providing that the contract shall be at an end and that all deposit moneys are to be 'non-refundable'. *The two contractual provisions are not only consistent and capable of standing together but may fairly be considered as mutually supplementary.* For all these reasons, there is no basis for supposing that Special Condition 3 was designed to be exhaustive or in some way to 'cover the field' of non-payment of the deposit moneys to the exclusion of the detailed provisions of Standard Condition 13.3. Indeed, in at least two instances (cll.2 and 8) where it was intended to displace provisions of the Standard Conditions, the Special Conditions expressly so provide.

……..Since the purchase price was $2.6 million, the deposit required under the contract was in this instance less than 10 per cent of that total. The fact that it was payable post-contractually in two amounts, rather than by a single sum on signing the contract, is uncommon in practice but certainly not unknown. It has been held to have the consequence of leaving the vendor with the right to recover the unpaid balance after terminating the contract. See *Bot v Tistevski* [1981] VicRp 13; [1981] VR 120; *Pendergast v Chapman* [1988] 2 NZLR 177, both of which were referred to with approval by this Court in *Cleargate Pty Ltd v Pacific Commerce Finance Limited* (App No 186 of 1993, May 10, 1994, unreported). The defendants' complaint that this involves an acceleration, without any express contractual provision in that behalf, of the date for payment of the second deposit instalment of $200,000 is not sustainable in the face of the provisions of cl. 13.3 and the decision in *Cooper v Ungar* [1958] HCA 9; (1958) 100 CLR 510. Far from suggesting that the express provisions of the contract or the Special Conditions were intended to displace this state of affairs, those provisions tend on the contrary to confirm it."

14. In *Boyarsky v Taylor* [2008] NSWSC 1415 Mr Taylor, the purchaser, claimed specific performance of a contract for the sale of a property. One of the issues was whether a provision in the contract requiring payment of a second instalment of the deposit upon the completion date was void as a penalty.

Special condition 12 provided that "the deposit is 10 per cent of the price, but payable in instalments with half of the deposit payable on exchange and the balance of the deposit payable on the completion date". Brereton J stated:

"[48] ... In *Luu* ... Bryson JA... held that provisions requiring a 5 per cent deposit to be topped up to 10 per cent on default were void as a penalty. In *Iannello*... Hodgson JA... rejected two attempts to distinguish the relevant condition in that case from that in *Iannello v Sharpe*.

...

[49] ... Where the right to receive such a payment arises on the happening of any number of events, some only of which are breaches of contract and some of which are not, but the event in the particular case is one which is a breach of contract, then the provision is a penalty and ……

Even if, which for reasons to which I shall come I doubt, the second payment was exigible in events other than breach of contract, on the facts of this case it is exacted on breach of contract, and in those circumstances is a penalty and void.

[50] In any event, I do not see how it could become payable under the present contract in circumstances that did not involve a breach by the purchaser of the

contract. ... ……..an unconditional promise to pay an amount on default cannot itself count as a deposit, because that is the very sort of promise that would normally amount to a promise to pay a penalty, unless it is a genuine pre-estimate of damages. ……."

Brereton J held that the provision requiring payment of the second deposit upon the completion date was void as a penalty.

15. In *Iannello*, special condition 14 provided that the first $225,000 constituted part of the deposit. It was purportedly agreed that in the event of default, the remaining $225,000 would become immediately due and payable and the purchaser would forfeit the sum of $450,000. *However, what is important in these cases is the timing stipulated in the contract for when the second payment is due. In Iannello, the remaining $225,000 was due on the date of completion.* This allowed Hodgson JA, with whom Santow and Basten JJA agreed, to conclude that *the second payment would have maintained no good faith or earnest character, as it would never be payable before the completion date, and thus its only purpose was to penalise the purchaser for defaulting.* This meant that despite special condition 14 categorising the remaining funds as deposit money, it was in reality, by virtue of the date that it was due, a penalty.

16. Harrison As J in *Rana* said that the same could be said for *Boyarsky*, where the second instalment of the deposit was due upon the date of completion and was thus found to be void as a penalty. This specific similarity between *Boyarsky* and *Iannello*, is what led Brereton J to find in *Boyarsky* that the second payment was void as a penalty.

17. Harrison As J then turned to *Luu* (para [61 of *Rana*], where the clause obligated the purchaser to pay up to 10 per cent of the purchase price upon defaulting. This clause was designed as a penalty clause aimed at discouraging default. It is not a deposit clause that seeks to foster the payment of further deposit money so that the purchaser can demonstrate continued earnest to fulfil the purchase contract.

18. Harrison As J said that similarly, both special condition 14 in *Iannello* and special condition B7 in Rana were to the same effect. That effect, in substance, is that where the full deposit has not been paid, the unpaid deposit money becomes immediately due and payable. These special conditions could thus be characterised as penalty clauses.

19. A recent case on split deposits is *Sydney Developments Pty Limited v Perry Properties Pty Limited* [2017] NSWSC 515. It considered the cases above. The deposit was 20%. The relevant SC provided as follows:

"Notwithstanding anything else in this contract it is agreed that the purchaser shall:

(a) pay to the vendor a deposit of 10% of the purchase price by bank cheque on the date of this contract; and
(b) pay to the vendor an additional deposit of 10% of the purchase price by bank cheque (whereby the deposit paid shall then be 20% of the purchase price) such payment to be by no later than 122 days from the date of this contract time being of the essence.

In the event that the purchaser does not comply with the terms of this special condition (which are essential terms of this contract) the vendor may terminate this Contract by notice in writing and *the purchaser shall forfeit the deposit paid on the date of this contract*."

"[16] It was suggested on behalf of the purchaser that Special Condition 25 should be seen as collateral to the primary stipulation that the purchaser pay the balance of the purchase price on completion, and that the required payments (which totalled 20% of the purchase price) are in the nature of a security for, or in terrorem of, satisfaction of that primary stipulation. It is difficult to regard Special Condition 25 in that way, given that the payments that are the subject of the condition are required to be paid whether or not the contract proceeds to completion. Special Condition 25 imposes no additional detriment upon the purchaser merely because completion does not occur. Nevertheless, if the contract is terminated due to a failure of the purchaser to comply with its essential obligations under Special Condition 25, the condition operates (in its own terms or in conjunction with clause 9) so that the purchaser forfeits its interest under the contract and the deposit paid on the date of the contract. In that way, Special Condition 25 incorporates a financial incentive for the purchaser to perform its obligations under the condition and to that extent is capable of being regarded as penal in nature."

"[40] As noted, the label used by the parties is not determinative. Nonetheless, the language of the Special Condition (which is stated to operate notwithstanding anything else in the contract) is indicative of an intention that both payments are in the nature of a deposit."

[42] The first payment is plainly in the nature of a deposit. The position is less clear in relation to the second payment. It is not payable until about four months after exchange of contracts. That is still some five months prior to the contractual completion date, so the second payment is capable of being characterised as a payment made as an earnest of performance (compare *Rana v Dalla Costa* [2014] NSWSC 1113 at [63]). *The second payment cannot, however, be characterised as a form of security for the performance of the purchaser's obligations, because the amount of the second payment is not forfeited in the event that the contract is terminated consequent upon breach by the purchaser.* It is not necessary to decide whether the second payment is itself in the nature of a deposit, or something else

such as an instalment of the purchase price. The task at hand involves an assessment of Special Condition 25 as a whole in order to determine whether it is penal.

[43] In my opinion, Special Condition 25 should not be characterised as a penalty. It provides for termination of the contract if the purchaser does not comply with the essential terms of the condition, in which case the purchaser forfeits the first payment of 10% of the purchase price. Regardless of whether that first payment is considered to be the only true deposit paid, or is considered to be part of a deposit amounting to 20% of the purchase price, only 10% of the purchase price may be forfeited."

20. Darke J distinguished these facts from others where a globular deposit of 20% or more was allowed, under the contract, to be declared forfeit upon termination by the vendor.

21. *For a WA case, see Du Buisson Perrine v Chan* [2016] WASCA 18. It is largely in line the NSSW approach.

Braidotti v Queensland City Properties Ltd [1991] HCA 19 is a case where consideration was given to whether a sum phrased to be a deposit, lost that character and was in truth an substance, to be regarded as payment on account of the price.

ISSUE 2. AMBIGUOUS PROVISIONS IN CONTRCTS FOR THE SALE OF LAND, REGARDING EASEMENTS

22. The rules as to the interpretation of contracts are constantly being clarified, in particular, the law on the admissibility of background and surrounding circumstances and evidence going to the genesis of the transaction. The cases below demonstrate that the dice is rolled when differing views are expressed as to the true construction of an agreement for the sale of land; and affirms the contract lawyers' adage that a contract only means what the Court says it means - including the final court on appeal.

In *Western Export Services Inc. v Jireh International Pty Ltd* [2011] HCA 45, the High Court in a short judgment reaffirmed the approach of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 139 CLR 337 at [352]:

*"… evidence of surrounding circumstances is admissible to assist in the interpretation of the contract **if** the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning."* [emphasis added]

Of course, we all know that *Jireh* itself has come in for some polite re examination in subsequent cases like *Electricity Generation Commission* (below). However, at the time *Tallwoods Pty Ltd v Mustapha* [2013] NSWSC 1551 was heard, the last word on the approach to construction/ interpretation was *Jireh*.

By Contract for the sale of land dated 2 October 2012, M purchased Lot 895 from Tallwoods ("TCT"). The contract documents included:

(a) the Certificate of Title , describing Lot 895 as being "At Tallwoods Village";

(b) a plan of sub division and Section 88B instrument, indicating that Lot 895 was subject to various restrictions, including style of building.

Special condition 19 provided as follows:

"The Vendor proposes to create a Right of Carriageway over Lot 895 in DP 1079140 in substantial accordance with the Draft Transfer Granting Easement and plan annexed hereto.

The Purchaser shall make no objection etc and if required by the Vendor, shall do all things reasonable and necessary to assist the Vendor create such Rights of Carriageway.

This special condition shall not merge on completion." (emphasis added)

The Draft Terms of Carriageway attached to the Contract noted the Transferor as TCT and the Transferee as *Tallwoods Int'l Golf Resort Pty Ltd* ("TGR"). The question provoked was whether M had to submit to an easement *not* in favour of the specific party named, but rather another party nominated by the Vendor, a Mr Ford?

Extracts from paras [29] – [37] of *Tallwoods:*

"The fulcrum of Ms Mustapha's argument was the word "create" in the expressions "The Vendor proposes to create" and "assist the Vendor create" in special condition 19. She argued that the clear literal meaning of "create" in this

context was that it was the vendor, Tallwoods, which was the party intended to do the creating of the easement. Ms Mustapha was not required to create the easement. …that obligation was only to assist Tallwoods as the creator of the easement.

Ms Mustapha therefore ascribed to the word "create" when used in connection with "the Vendor" the meaning that it was the vendor who was intended to be the proximate creator, or the direct instrument of the creation of the easement.

If, contrary to her primary submission, the wording of special condition 19 was ambiguous, Ms Mustapha argued that surrounding circumstances supported her construction.

Whereas Ms Mustapha argued that "create" required that the vendor be the proximate cause or direct instrument of the creation of the easement, Tallwoods submitted that the vendor could be the creator of the easement in a less direct way that did not require that the vendor be the party that actually executed the transfer granting easement. According to Tallwoods, the proper meaning to be given to the word "create" was one which permitted Tallwoods as the original vendor to be the instigator of a process which ultimately led to the creation of the easement, and it was immaterial whether other parties were required to cooperate in the process of creation, or even that another party was required to be the direct instrument for the creation of the easement as the party that executed the transfer granting easement.

23. Mustapha referred to *Jireh International Pty Ltd v Western Export Services Inc* [2011] NSWCA 137 at paragraph 29, submitting that the correct approach in construing a contract of this nature is to give:

"…commercial agreements a commercial and business-like interpretation. However, their ability to do so is constrained by the language use by the parties. If after considering the contract as a whole and the background circumstances known to both parties, a court concludes that the language of a contract is unambiguous, the court must give effect to that language unless to do so would give the contract an absurd operation. In the case of absurdity, a court is able to conclude that the parties must have made a mistake in the language that they used and to correct that mistake. A court is not justified in disregarding unambiguous language simply because the contract would have a commercial and businesslike operation if an interpretation different that dictated by the language were adopted." At [55] (emphasis added)

24. After reference to the correct approach to construing contracts where there is ambiguity, the Court said:

The key word in the clause centred around the word 'create' and it was the defendant's submission that the word create was to be used in the one plain and literal meaning of the expression "the Vendor proposes to create" in special condition 19, which was that "the plaintiff is to create the easement" at [19].

T relied upon the condition that the condition would not merge upon completion and that the proposal to create the easement was in "substantial accordance with the Draft Transfer Granting Easement". The special condition itself, as noted above, did not stipulate who was to be the transferor and who was to be transferee. The special condition showed that there was an intention to create the easement.

25. Robb J held that the word 'create' in this context does not 'necessarily require that the vendor be the immediate instrument of the creation' and that the phrase could have multiple meanings. HH further considered the meanings of the word 'create' in the necessary objective sense in context of the whole of the contract including that it 'shall not merge on completion'.

ISSUES 3. REASONABLE ENDEAVOURS

26. There are numerous efforts or endeavours standards, including "best efforts," "reasonable efforts," "commercially reasonable efforts," "commercial best efforts," "all reasonable efforts," and "all efforts," to name a few. What magic formulae ought draftspersons deploy in contract for the sale of land off the plan?

The question arises because all contracts for the sale of land "off the plan", contemplate the developer (or sometimes the builder), taking steps to progress the development to the point where the LPI approves of the plan of sub division; and creates individual lots.

Sometimes what is being sold is vacant land, duly sub divided with essential services e.g. water, NBN, gas , electricity , sewerage etc.
Sometimes, what is being sold is the finished product, usually a strata unit with e.g. rights to use a car space, or perhaps a car space on title.

27. But whatever the scenario, the contract has to cater for the possibility that the developer / builder cannot progress what can loosely be called the "works" (whatever they are) , by a given date.

That is called the “sunset date”. If the sunset date is not reached by the time specified in the contract, then typically the developer/ builder is given the right to serve a notice extending this date by a given period , usually 3 – 6 months. If the date is not so extended, then either party can then recind *ab initio*, with the deposit being returned.

28. Risks faced by developers include weather (ie lengthy rain days); high wind (cranes cannot operate when the wind speed is over a certain amount, and thus work on high rise developments slows down tremendously and heavy loads are carted around by hand moved around by smaller , mobile cranes if any are available ; sub soil conditions can be unexpected eg the water table can be higher than expected, making the excavated site a bath tub that keeps filling up and requiring work in muddy conditions . This in turn makes heavy drilling rigs unstable and liable to topple over.

If that occurs, crushed stone has to be trucked in, and spread over the site to provide a stabilised platform for the heavy machinery.

Certain building techniques may be novel, and not go quite as planned. Rock anchors that stabilise retaining walls can pull loose, causing collapse.

Workmen can go on strike.

29. Other state agencies can delay the project, when their concurrence to development is required e.g. if cranes are going to to go up near rail way lines, then State Rail will usually require a deed with certain undertakings e.g. no swinging of crane booms, over the lines.

These are only some of the risks that developer face, and why they cannot do more than use some variant of effort (reasonable/ best etc.) to bring the works to completion and to achieve sub division, by a given date.

30. In a rising market, it is the developer who is more motivated to say that it could not, using reasonable/ best /whatever efforts, achieve practical completion of the works and or registration of the SP, by the contractually delimited date. On that contingency, the developer can re-sell, return the deposit and serve a laconic notice (they are usually about 5 lines long) saying:

“Sorry, I’ve really used my very best efforts, but I just could not achieve practical completion by the 30th March XXXX. As such, I elect to rescind and hereby return your deposit.

Do not hesitate to be in contact if you want brochures for our future

developments."

31. By this time, the deposits taken by the developer have funded the project (financiers will require a certain amount of deposits to be taken before the project loan can be drawn down); so in effect, the project has been funded with the assistance of the purchasers, whose deposits have off set interest.
In the interregnum between exchange and rescission, the market has (at least in the last few years) risen, and dramatically so. Thus, the purchasers are often priced out the market they find themselves in, with their returned deposits, and to rub salt into the wound, the developer reaps the rewards of its own misfortune.

Consideration of cases

32. In *Electricity Generation Corporation v Woodside Energy Ltd,*[1] the High Court dealt with a 'reasonable endeavours' clause, see para [40-43]. The plurality observed that three general observations can be made about obligations to use reasonable endeavours to achieve a contractual object.[2]

(i) an obligation expressed thus is not an absolute or unconditional obligation.[3]

(ii) the nature and extent of an obligation imposed in such terms is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect an obligee's business.[4]

(iii) some contracts containing an obligation to use or make reasonable endeavours to achieve a contractual object contain their own internal standard of what is reasonable, by some express reference relevant to the business interest of an obligor.[5]

33. A helpful analysis of the meaning of the contractual phrases "best endeavours", or 'all reasonable endeavours" and "reasonable endeavours" is provided in S A Christensen and W D Duncan, *The Construction and Performance of Commercial Contracts,*[6] , an excerpt from which is set out below:

What constitute reasonable endeavours may differ depending upon the nature of the agreement, the obligations of the parties under the contract and whether

[1] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].
[2] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].
[3] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].
[4] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].
[5] [2014] HCA 7 at [43]; (2014) 251 CLR 640 at [43].
[6] The Federation Press, 2013, para [9.4.1.4], Pages 254-257.

the parties have provided a contractual standard for measuring what is reasonable. The steps or actions a reasonable person will take depend on what objectively has to be done to fulfil the condition in the context of the agreement and, therefore, requires an individual assessment of each factual situation. Australian courts have emphasized that the covenantor does not need to go beyond the bounds of what is reasonable to fulfil the condition or risk financial ruin to achieve the required result. The learned authors summarised what they saw as the golden threads running through the cases analysed, including
(i) Both reasonable and best endeavours may involve the outlay of money if such a liability is within the contemplation of the parties as a possible condition of approval and the amount involved is not disproportionate.
(i) a party may take into account their own commercial interests;
(iii) *the parties may agree upon a contractual standard for measuring what is reasonable which includes the business interests of the covenantor.*

Construction/ interpretation: are rights and obligations inter dependant?

34. *Sydney Attractions Group Pty Ltd v Frederick v Schulman* [2013] NSWSC 858 Para [45]:

(1) "The principles relevant to determining whether the relevant rights and obligations in the Deed are dependent on each other are: the question is one of construction;

(2) the more closely the obligations are linked to the rights, the easier it will be to construe the rights as qualified by due observance of the obligation;

(3) if the obligation constitutes a substantial part of the consideration for the contract or right the court is likely to construe it as a dependent obligation. That is, to construe the right as qualified by due observance of the obligation; and

(4) a practical approach prevails, whereby the presumption is that obligations are dependent in character."

Application of legal principles in "off the plan" cases in New South Wales

35. Two scenarios must immediately be distinguished:
First, the unamended standard form of contract, where the cases in NSW say that compliance is said to be *a condition* of being able to rescind ; and
Second, situations where the standard form contract has been modified , such as *Wang v Kaymet*.

36. Using the standard form is NOT in the developer's interests, as a stricter level of compliance is called for : compliance is a *condition* to exercising the power to rescind. Special conditions almost always water down the standard form in some way.
So one significant practical drafting matter , is whether the standard form of contract is used unamended (and I've never seen this in practice—there are always special conditions inserted by the developer)
What is said below , relates to situation where the standard form has been modified .
What follows below is a discussion of the law where the strandard form has been amended.

Restrictions on exercise of rights of rescission recur in contracts for the sale "off-the-plan" of dwellings in proposed strata developments.[7]

37. A right of rescission may be restricted by implied terms to be discerned on the whole view of the parties' contract, or by the application of implications arising under general contract law.[8] These implications include an obligation by one party to a contract to do all such things as is necessary on their part to enable the other party to have the benefit of the contract.[9]

The law also implies a negative covenant not to hinder or prevent the fulfilment of the purpose of the express promises made by the contract.[10]

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[7] *Munro v Bodrex P/L* [2002] NSWSC 122 at [49] (Bryson J).
[8] *Munro v Bodrex P/L* [2002] NSWSC 122 at [49] (Bryson J).
[9] *Peters (WA) Ltd v Petersville Ltd* (2001) 75 ALJR 1385 at 1393 [36]; *Butt v McDonald* (1896) 7 QLJ 68 at 70-71; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607-608.
[10] *Shepherd v Felt & Textile of Australia Ltd* (1931) 45 CLR 359 at 378.

A party to a contract is not entitled, as against the other party, to rely on an event resulting from the first party's wrongful act.[11]

38. The relevant principles may be summarised as follows: a party to a contract is not entitled, as against the other party, to rely on an event resulting from a first party's wrongful act; but if the failure by the rescinding party to obtain some relevant consent or registration within the contractual period resulted from any default by him in the performance of express or implied obligations, that party is not entitled to exercise a right of rescission otherwise available; and causation of the failure to obtain consent or registration by the wrongful act must be proved unless the terms of the contract made containing the consent or registration a condition for the exercise of the right of rescission.[12]

Causation: substantial chance that the condition would have been fulfilled

39. If one can say that, if the breach had not occurred, there was a *substantial chance* that the condition would have been fulfilled, that would be enough to deprive the vendor of the right to rescind.[13]

The test for causation is that if the reason the strata plan was not registered by the date for registration was that the vendor was in breach of the obligation to use reasonable endeavours, or if such a breach *materially contributed* to the strata plan's not being registered by that date, then the vendor is not entitled to rely on the clause conferring a right of rescission.[14]: *Hunyor v Tilelli* (1997) 8 BPR 15,629 at p 15,633;

"A party to a contract is not entitled as against the other party to rely on an event caused *or materially contributed* to by the first party's own breach of the Contract."

Accordingly, *one does not have to see that the default was the whole cause of the non-fulfilment of the condition,* nor must the opposing party necessarily be blameless. One has got to look at whether the person seeking to rescind the contract *materially contributed to the non-performance of the condition on which*

[11] *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 440-443; *New Zealand Shipping Co Ltd v Societe Des Ateliers et Chantiers de France* [1919] AC 1 at 7-8 and 12; see also *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at 591-594.
[12] *Shenk v Acn 081 123 140 P/L* [2002] NSWSC 123 at [20] (Bryson J).
[13] *Masters v Belpate Pty Ltd* [2001] NSWSC 169 at [66] (Hodgson CJ in Eq).
[14] *Blumor Pty Ltd v Handley* (1996) 41 NSWLR 30 at 34 (McLelland JC in Eq). *Masters v Belpate Pty Ltd* [2001] NSWSC 169 at 58-66 (Hodgson CJ in Eq); *Munro v Bodrex P/L* [2002] NSWSC 122 at [51] (Bryson J); *Gauld v Obsidian Holdings Pty Ltd* [2009] NSWSC 924 at [38]; *Sanctuary Investments Pty Ltd v St Gregory's Armenian School Incorporated* [1998] NSWSC 788, p4 of 9 (Young J).

it now bases its rescission. See too *Sanctuary Investments Pty Ltd v St Gregory's Armenian School Incorporated* [1998] NSWSC 788 ; *Joseph Street Pty Ltd & Ors v Tan & Ors* [2012] VSCA 113 at para [47][15]; *Lianghong Mei v West Apartments Pty Ltd* [2011] NSWSC 662.

One does need to be aware however, of what was said in *Plumor v Handley* (1996) 41 NSWLR 30 at 43 C- E , that whilst one only needed to find a "sufficient causal relationship between the defendants non-compliance and failure to do the relevant act (in the case at hand, obtain registration of the SP)

"If that failure would have occurred in any event , non-compliance with the obligation would not affect the defendants right of rescission".

Equitable remedies if vendor capricious and unconscionable

40. The exercise of a right of rescission, even if authorised by the terms of the parties' contract, maybe deprived of the effect by equitable remedies referred to by Viscount Radcliffe speaking for the Judicial Committee in *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 at 1422-3 in these terms:

"…….. a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of sale 'brevi manu,' since by doing so he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of 'recklessness' in entering into his contract…….which their Lordships understand to connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission……."

Independent contractors

41. There are matters which may be considered matters of specialist expertise, which a developer would normally leave to an architect, engineer or builder: to

[15] citing Brereton J in *Mordue v Kroone* [2009] NSWSC 255, at [16] and the "*numerous cases* " gathered by Brereton J,

an architect, the drawing of plans and supervision of building works; to an engineer, similar tasks; and to a builder, actual execution of the work.[16] In those matters, the independent contractors should not be regarded as agents of the developer in carrying out the developer's role in obtaining registration of the strata plan.[17] Delays attributable to independent contractors and carrying out those tasks would not *ipso facto* involve a breach of the vendor's obligation. Thus, where a builder caused delay by walking off the site because of problems the builder had which were unrelated to the job, that was not considered a breach of the vendor's obligation.[18]

Even where delay arises from the conduct of independent contractors in carrying out matters of specialist expertise, there may be associated breaches by the vendor/developer itself, for example in selection of the contractors, in provision of instruction and information, in monitoring progress, and/or in failing to replace the specialist expert when this should have been done.[19]

Onus in NSW cases

42. The issue of whether the non-obtaining of registration of a strata plan within the period stipulated resulted from a breach by the defendant of contractual obligations, rests on the Plaintiff.[20]

Plumor P/L v Handley (1996) 41 NSWLR 30, was thought to establish that the onus of proof where the power to rescind is said to have been not available because of a 'breach' by the vendor, rests with the Plaintiff: see McLelland CJ in Eq at 36(A) read with 35(C-G). Although the Plaintiff carries the onus of proof, questions of the shifting tactical onus, based upon the parties' means to establish proof, come into play: see *Munro* at [53] citing *Hunyor*.

But see the strong contrary views expressed recently by Robb J in *Al Achrafi v Topic* [2016] NSWSC 1807.

All evidence is, however, to be weighed according to the proof which it was

[16] *Hardy v Wardy* [2001] NSWSC 1141 at [64] (Bryson J).
[17] *Hardy v Wardy* [2001] NSWSC 1141 at [64] (Bryson J).
[18] *Woodcock v Parlby Investments Pty Ltd* (1988) 4 BPR 9568; *Hardy v Wardy* [2001] NSWSC 1141 at [64] (Bryson J).
[19] *Hardy v Wardy* [2001] NSWSC 1141 at [65] (Bryson J).
[20] *Plumor Pty Ltd v Handley* (1996) 41 NSWLR 30 at 35A-36B (McLelland CJ in Eq).

reasonably within the means of one party to produce or of the other to contradict.[21]

Where the relevant facts are peculiarly within the knowledge of the vendor, there may be an evidentiary onus on the vendor to lead evidence as to what happened, because if the vendor does not do this, inferences may be drawn against the vendor, for example by unexplained delays: see *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561 at 565-6; *Hawes v Cuzeno Pty Ltd* (1999) 10 BPR 18,011 at [41]; *Masters v Belpate Pty Ltd* [2001] NSWSC 169 at [59] (Hodgson CJ in Eq).

Express and implied terms

43. The law is settled at intermediate appellate court level, by unanimous Victorian Court of Appeal in *Etna v Arif* [1999] VSCA 99 paragraph [55], that the obligation to use reasonable endeavours can endure on the basis of express contractual terms up to the date for registration of the SP , and thereafter on the basis of an implied term, *up and until the date of rescission*. This was referred to with *obiter* approval in para [7] by a differently constituted unanimous Victorian Court of Appeal, in *Joseph Street Pty Ltd & Ors v Tan & Ors* [2012] VSCA 113.

Case Study:

Wang v Kaymet Corporation Pty Ltd [2015] NSWSC 1058

44. The proceedings concerned the development of two towers of apartments at Wolli Creek. Since the towers were adjacent to the East Hills railway line, the “concurrence” of RailCorp was required to the DA; and until their “concurrence” was to hand, the DA would remain conditional and as such, work could not start.

By contracts entered into with the defendants between November 2009 and April 2010, the plaintiffs agreed to purchase "off the plan" 43 of the 94 residential apartments proposed to be built in the development. Each contract contained a promise by the defendants to use their "reasonable endeavours" to complete the project within 30 months of contract, and provided that either party

[21] *Hunyor & Anor v Tilelli* (1997) 8 BPR [97667] 15,629 at 15,631 (McLelland CJ in Eq).

could rescind the contract if completion did not take place within that time.

The project was not completed by the relevant date. In the period of significant delay, the property market rose substantially.

The defendant rescinded the contracts, asserting that despite its reasonable endeavours, the project had been unavoidably delayed beyond the sunset date. The plaintiffs sought specific performance. The defendant prevailed.

Legislative Changes 17 November 2015 Media Release

45. "NSW Parliament today approved amendments to the Conveyancing Act 1919, strengthening protections for buyers who purchase properties off the plan.

Minister for Innovation and Better Regulation Victor Dominello said the new laws are intended to prevent rogue developers from rescinding contracts using the sunset clause to make windfall profits.

"The NSW Government has listened to the community's concerns and acted swiftly to provide home buyers with greater certainty," he said.

"Any developers who are thinking of acting unethically should know that their behaviour will no longer be tolerated."

46. Sec 66 ZL NSW *Conveyancing Act* is entitled Rescission under sunset clauses. It was introduced by the *Conveyancing Amendment (Sunset Clauses) Act 2015, a*ssented to 24.11.2015 and apparently has effect on and from 2 November 2015 (but please check this).

It provides:

(1) In this section:

"off the plan contract" means a contract for the sale of a residential lot (the **"subject lot"**) that has not been created at the time that the contract is entered into.

"residential lot" means a lot (whether a strata lot or otherwise) that is residential property within the meaning of section 66Q.

"sunset clause" means a provision of an off the plan contract that provides for

the contract to be rescinded if the subject lot is not created by the sunset date.

"sunset date" means the date set out in the off the plan contract as the latest date (subject to any extension provided for in the contract) by which the subject lot must be created.

(2) For the purposes of this section, a lot is created when the plan creating the lot becomes a registered plan.

(3) A vendor may rescind an off the plan contract under a sunset clause if the subject lot has not been created by the sunset date, but only if:

(a) each purchaser under the contract, at any time after being served with the notice under subsection (4), consents in writing to the rescission, or

(b) the vendor has obtained an order of the Supreme Court under this section permitting the vendor to rescind the contract under the sunset clause, or

(c) the regulations otherwise permit the vendor to rescind the contract under the sunset clause.

(4) It is a term of an off the plan contract that a vendor who is proposing to rescind the contract under a sunset clause must serve each purchaser under the contract notice in writing at least 28 days before the proposed rescission that specifies why the vendor is proposing to rescind the contract and the reason for the delay in creating the subject lot.

(5) A sunset clause cannot automatically rescind an off the plan contract and, if it purports to do so, it is to be read as if it instead permits the contract to be rescinded on or after the sunset date in accordance with this section.

(6) The Supreme Court may on the application of a vendor under an off the plan contract make an order permitting the vendor to rescind the contract under a sunset clause but only if the vendor satisfies the Court that making the order is just and equitable in all the circumstances.

(7) In determining whether it is just and equitable in all the circumstances the Court is to take the following into account:

(a) *the terms of the off the plan contract,*

(b) whether the vendor has acted unreasonably or in bad faith,

(c) the reason for the delay in creating the subject lot,

(d) the likely date on which the subject lot will be created,

(e) whether the subject lot has increased in value,

(f) the effect of the rescission on each purchaser,

(g) any other matter that the Court considers to be relevant,

(h) any other matter prescribed by the regulations.

(8) The vendor is liable to pay the costs of a purchaser in relation to the proceedings for an order under this section unless the vendor satisfies the Court that the purchaser unreasonably withheld consent to the rescission of the off the plan contract under the sunset clause.

(9) Nothing in this section limits any right that a purchaser may have to rescind an off the plan contract under a sunset clause.

(10) Notice may be served on a purchaser by serving it on a person who is authorised under the off the plan contract as a representative of the purchaser.

Jobema Developments Pty Limited v Zhu & Ors [2016] NSWSC 3

47. Jobema took over a development, where the original developer Xycom had entered into sales “off the plan” . There was a sunset provision. Jobema asserted it had the right to rescind because of increased construction costs or current market conditions in respect of purchase prices. However, it failed lead evidence of those matters; nor did it take the court into its confidence as to why certain purchasers had had the good fortune to have their contracts extended, though not the Plaintiff.

48. HH found that the delay largely resulted from Xycom's lack of action but since Jobema, had assumed Xycom's obligations with knowledge of that position, that did not assist it under s 66ZL C.A. The “bottom line” is in para [27], as follows :

“It seems to me that, in the relevant circumstances, several matters on which Jobema relies to support its application, including increases in construction costs and purchase prices have not been established; to the extent that there has been delay, prior to Jobema's acquisition of the site, that is a matter which Jobema was aware of, and cannot avoid having taken into account, when it has assumed Xycom's obligations under the contract; if Jobema assumed that the legislature would not intervene to increase the protection available to off the plan purchasers, that assumption was a business risk, and the legislative change which has occurred was also a risk which it assumed; and finally, the selective and unexplained process by which some purchasers have their sunset

dates extended, by agreement with the vendor, and others do not, is a matter which tends against the grant of leave sought."

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