



Terminating an “off the plan” contract for the sale of property: making the right decision counts

Introduction

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For many people, the purchase of a residential property represents the biggest purchase of their lives. Although such transactions are reasonably straight forward, sometimes things can go wrong and can become very complicated.

Recently the NSW Court of Appeal considered whether a purchaser of an “off the plan” property was entitled to terminate the contract for the purchase of that property¹. The case highlights the consequences of decisions made by parties in circumstances where a contract appears to have been breached.

Key Background Facts

The Scotts entered into a contract with Nicole to buy an ‘off the plan’ lot in a proposed subdivision of Nicole’s property.

- The contract contained a ‘sunset’ clause – a sunset clause is a term in an ‘off the plan’ contract which allows the vendor or the purchaser (or both) to terminate the contract if the plan of subdivision is not registered by a certain date.
- In this case, the sunset clause said that if the plan of subdivision for Nicole’s property (which would create the lot the Scott’s proposed to buy) wasn’t registered within 12 months of the date of the contract (‘Sunset Date’), the Scott’s or Nicole could rescind (terminate) the contract.
- A sunset clause doesn’t however give a vendor an automatic right to terminate a contract. If a vendor wants to terminate, they must get the consent of the purchaser or an order from the Supreme Court that allows them to do so.
- The plan of subdivision was not registered by the Sunset Date. Nicole (as Vendor) wanted to terminate the contract but the Scott’s (as Purchasers) refused to give their consent.
- In a letter from Nicole’s solicitors to the Scott’s solicitors, Nicole indicated that she terminated the contract in accordance with the sunset clause.
- The Scott’s solicitors responded, pointing out that either the Scott’s needed to consent or Nicole needed to get an order from the Supreme Court.
- Nicole’s solicitors wrote back, again indicating that Nicole believed the contract had been terminated. They also advised that Nicole had arranged for the deposit to be returned to the Scott’s.

The First Proceedings

- The Scott’s then elected to commence proceedings against Nicole - they asked that the Supreme Court order Nicole to perform the contract (i.e. take steps to get the plan of subdivision registered and then sell the lot to the Scott’s).
- Shortly after, Nicole validly terminated the contract pursuant to a different clause in the contract (that clause isn’t relevant for present purposes – what is important is that Nicole terminated the contract, not the Scott’s).
- The Scott’s then amended their claim in the proceedings against Nicole. They sought an order that Nicole perform the contract *or* damages for breach of the contract.
- Later, the Scott’s accepted that the contract had been validly terminated by Nicole. Being unable to ask the Court to order Nicole to perform the contract (because it was terminated), they sought damages only.

Surely Nicole breached the contract?

When Nicole (wrongly) indicated that she had terminated the contract and made arrangements for the deposit to be returned, she demonstrated that she no longer intended to be bound by the contract.

The legal concept when that occurs is called repudiation. When a party repudiates a contract, they expose themselves to a claim for damages.

So the Scott’s could claim damages?

No – it’s not as simple as that.

You will recall that after Nicole’s repudiation, the Scott’s commenced the proceedings. Then Nicole validly terminated the contract. The timing of these matters is important.

When the parties went to Court, the Court had to consider whether the Scott’s were entitled to claim damages. The Court found that they were not, as their entitlement to claim damages could have only arisen if the contract was terminated due to Nicole’s repudiation (this is a legal principle set out in many, many other decisions).

The Scott’s downfall was that, rather than accepting Nicole’s repudiation, which would have entitled them to terminate the contract and seek damages, they elected to commence the proceedings seeking an order that Nicole perform the contract.

In legal terms, this means the Scott’s affirmed the contract. Had they elected to accept Nicole’s repudiation and terminate the contract instead, they would have had a claim against Nicole for damages.

When Nicole subsequently terminated the contract, the Scott’s lost their right to claim damages from her.

The Outcome

The Supreme Court dismissed the Scott’s claim. The Scott’s had to pay Nicole’s costs.

The Scott’s appealed the decision. The Court of Appeal agreed with the original decision, dismissed the appeal and ordered the Scott’s to pay Nicole’s costs (again).

What does this mean for purchasers and vendors?

This matter demonstrates caution (and expert advice) is required when a party seeks to exercise a right to rescind or terminate a contract or elects to take a certain course of action in response to another parties conduct.

This case could have resulted in a poor outcome for both parties; it clearly ended badly for the Scott’s but had they elected to terminate the contract due to Nicole’s repudiation, Nicole would have faced a damages claim.

If you have any questions or would like to discuss this matter further, please contact Chris Kintis on 02 8235 1251.

¹Scott v Ennis-Oakes [2020] NSWCA 239