

Property Update

March 2010

Developer puts cart before the horse on viability clause

In the recent case of Condor Developments Pty Ltd v Helsby [2010] WASCA 16, the Court of Appeal refused to allow a developer to rely on a viability clause in an off the plan high rise contract.

Summary of case

Under the contract, the developer was entitled to terminate on viability grounds, but only after certain other conditions (such as pre-sales and development approvals)

had been satisfied by certain deadlines. These conditions were not satisfied by the relevant deadlines. However, the developer proceeded to rely on the viability clause on the basis that the conditions had been satisfied after the relevant deadlines.

The Court held that the conditions could only have been satisfied within the relevant deadlines. This meant that the developer was not entitled to rely on the viability clause as the other conditions necessary to trigger this were never satisfied.

Background

Condor Developments Pty Ltd, was the developer of an apartment building complex on St George's Terrace in Perth known as Condor Towers.

Condor entered into an off the plan sale contract to sell one of the apartments to Alan Helsby and Vanessa Prosser on 8 March 2005.



About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia, comprising of over 200 staff which includes 20 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. Advising on all aspects of property acquisition, disposals and developments including syndications, we have one of the few accredited leasing experts available to clients who has significant Australia-wide experience on very large and complicated leasing developments.

At Lavan Legal we believe in building long lasting relationships with our clients. We provide the best legal advice and service and continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through continuous innovation and process improvement.

Property Update

March 2010

The contract contained a number of conditions. These were:

- 1 amalgamation of the land on which Condor Towers was to be built;
- 2 planning approval for the proposed development of Condor Towers;
- 3 the granting of a building licence in respect of Condor Towers; and
- 4 achieving sufficient pre-sales for Condor Towers.

Each of these conditions were subject to deadlines for their satisfaction, which were stated in the contract.

The contract also gave the developer the right to terminate the contract on viability grounds. Importantly, this right to terminate could only be exercised after the other conditions of the contract had been satisfied.

The amalgamation, planning approval and building licence conditions were not satisfied by their relevant deadlines. Only the pre-sales condition was satisfied in time.

Developer's purported termination

In June 2007, the developer wrote to the buyer, purporting to terminate the contract on viability grounds. The buyer objected to this on the basis that the developer was not entitled to do so, as the other conditions in the contract were not satisfied.

The developer argued that the conditions were satisfied, even though the actual date of their satisfaction occurred after the deadline in the contract.

Initial decision and appeal

The matter proceeded to the Supreme Court where the trial judge agreed with the buyer's argument and held that the developer was not entitled to terminate the contract on viability grounds.

The developer then appealed to the Court of Appeal. The Court of Appeal unanimously upheld the decision of the trial judge.

Newnes JA, who provided the bulk of the judgement, relied on the legal principle that a condition can only be satisfied within the relevant deadline for its satisfaction.

This meant that the developer's entitlement to terminate on viability grounds never arose, as the pre-conditions to this were never satisfied:

'It follows that on the proper construction of cl 2.5 [the viability clause], the appellant's entitlement to consider the viability of Condor Towers arose after all of the other cl 2 conditions had been satisfied; that is, when all of the relevant events had occurred within the stipulated time limits. If, therefore, any of the conditions was not,

and could never be, satisfied, the right to consider viability under cl 2.5.3 simply did not arise...'

The Court was also highly critical of the drafting of the contract, referring to it as a 'Serbonian Bog' (a quagmire in Egypt) through which the Court had to wade to make sense of the agreement.

Implications for developers

This case illustrates the importance of proper contract drafting and project management.

Conditions in contracts should be carefully drafted to accommodate the specific requirements of the developer and any deadlines pertaining to those conditions should be closely monitored.

Also, the effect of non-satisfaction of a condition should be understood at the time of preparing a contract, and an appropriate safety net should be built into the contract (if possible).

For further information on this case, or implications for your development contracts, please contact Ronnie Nardizzi, Senior Associate, on (08) 9288 6986 or ronnie.nardizzi@lavanlegal.com.au.

Your personal details

Lavan Legal may use personal information we have collected about you to send materials to you about legal and related issues we think will be of interest, as well as news about Lavan Legal and the services we provide.

If you do not want us to use your personal information for that purpose, or would like us to update your contact details, please email calley.kempson@lavanlegal.com.au providing your name, company name, title, email address, postal address and a contact telephone number.