

STATE CHAMBERS

LEVEL 36 52 MARTIN PLACE SYDNEY NSW 2000

DX 410 SYDNEY ☎ (02) 9223 1522 📠 (02) 9223 7646

STATECHAMBERS.NET

IN THE SUPREME COURT OF NEW SOUTH WALES

Case No. 2016/38397

***DGF Property Holdings Pty Limited v Di Federico* [2018] NSWSC 344**

Before: Emmett AJA

Date of Judgment: 23 March 2018

Case Note

66ZL of the *Conveyancing Act* prevents a vendor from exercising a contractual right to rescind an off the plan contract for the purchase of residential property without the consent of the purchaser or without leave of the Court.

The Court can only give leave when it is just and equitable in all of the circumstances to do so.

The vendor said it was just and equitable to give leave because the contracts for purchase of the residential lots to be created by registration of a plan a sub-division had been entered prior to the commencement of section 66ZL and the delay had been caused by the inaction of a third party. The vendor proved the later.

The vendor did try to rely on the financial consequences to it of not being able to rescind but it was “*well-nigh impossible to be satisfied as to the financial consequences,*” for the vendor: at [383]

Emmett AJA accepted the following:

1. The Court can only give leave to the vendor to exercise an available contractual right to rescind: at [200], [236] and [272];
2. There is no contractual right to rescind if the condition precedent for rescission exists because of the vendor's own breach of the contract for sale: at [240]
3. The right to rescind would be lost by abandonment or affirmation: at [250];
4. The vendor has the onus of proving that in all the circumstances it is just and equitable that leave be given to exercise the contractual right: at [264];
5. Part of establishing that it is just and equitable the vendor must show that it has, up to the time of hearing, acted reasonably and in good faith: at [263] and [265]
6. The purchasers have the evidential onus of proving matters in their knowledge; at [265]; and
7. *"Section 66ZL operates to change the allocation of the risk resulting from delay,"* from the purchaser to the vendor: at [266]

Despite the above propositions, the case was not determined by asking the questions mandated by the section: Is it just and equitable in all the circumstances that leave be given to the vendor to exercise its contractual right to rescind?

Instead the question asked seems to have been: Under what circumstances would it be just and equitable to give the vendor leave to rescind?

This approach was justified because the decision to refuse or to give leave could be "arbitrary and unfair": at [378] and

"Accordingly, in many circumstances, the making or refusing of an order permitting rescission would be just and equitable only if the making or refusing the order were to be on terms and conditions."

This resulted in the vendor being given leave to rescind, but only upon it giving undertakings to the Court to the effect that they would complete the development and immediately after rescission offer new contracts with the purchasers at a higher contract price, determined by adding about a years interest to the original contract price.

One view is that this is a sensible decision. The increase in price is very small considering that the lots have nearly doubled in value and an undertaking to complete the development has been extracted when it was uncertain what the vendor's response would have been had leave to rescind not been given.

However, the substance of the decision is to vary the existing contractual rights of the parties, beyond requiring leave to rescind, and this is something section 66ZL does not permit.

Indeed, a vendor could never prove that it is just and equitable to permit it to rescind contracts without giving full and frank evidence of its finances, so that a comparison could be made of its position on each scenario.

Sub-section (8) provides that the vendor is to pay the costs of the proceedings unless it establishes that the purchaser unreasonably held consent. The vendor did not discharge this onus.

Damien Allen

State Chambers

26 March 2018