When “off the plan” goes “off the rails”

Buying a strata apartment "off the plan", i.e. based on drawings and specifications, before it has been built, can go wrong, but there are potentially things you can do to protect your position.

This has been illustrated by a number of recent Sydney developments, where serious defects were identified and new owners were faced with enormous rectification costs, doubts about whether developers/builders and other third parties could be held liable and with their ability to occupy, lease, refinance or sell their apartments hindered.

The position has become even more complicated with the enactment of new legislation aimed at protecting purchasers, including the Design and Building Practitioners Act 2020 and the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020. The latter Act creates the office of NSW Building Commissioner and gives the Commissioner substantial investigative and enforcement powers. The legislation can result in a scenario in which significant defects are identified in an apartment building before it is completed and a range of orders are made, which could include an order prohibiting issue of an occupation certificate or an order that rectification work be undertaken. There is also the possibility of Council becoming involved and making various orders.

A purchaser in these circumstances may have rights under the contract for sale, but these will usually be very limited and such a purchaser would be well advised to obtain legal advice as to how these rights are impacted by the legislation and the best approach to take.

The crucial issues for purchasers to consider before going down that path are:

- On the one hand, a purchaser considering terminating a contract should not take further action towards performing the contract. Such action could be seen as an affirmation of the contract and negate the purchaser's ability to terminate the contract.

- On the other hand, a purchaser should terminate only by lawful means and on lawful grounds, as the purchaser may otherwise be seen as the party in breach of the contract. That could be catastrophic, giving the purchaser considerable exposure, e.g. to termination of the contract by the vendor, loss of the deposit and liability for any shortfall on resale if it exceeds the deposit, legal costs and interest.

The key points in relation to termination or rescission of a contract by a purchaser in this scenario are:

- The contract for sale, having been prepared by the developer, will usually give a purchaser only limited rights if things go wrong and it is common for purchasers to let this go in their enthusiasm to get an offer accepted and a contract signed. However, there will usually be some scope for rescission in the event that there has been a significant change in what is being purchased. Accordingly, it is well worth reviewing contracts and drawings and considering whether a contractual right of rescission may be available.

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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- Purchaser rights implied into contracts by legislation and common law principles may include a right of rescission. An order requiring remedial work may well trigger such a right, but an order prohibiting the issue of an occupation certificate probably will not. However, an order prohibiting the issue of an occupation certificate will likely allow a purchase to delay completion, possibly until the date by which the contract requires completion, possibly allowing the purchaser to rescind the contract on that basis.

- The takeaway point is that there may well be things you can do if the project in which you are purchasing is going wrong, but you should obtain legal advice as soon as possible to minimise the risk of losing rights or exposing yourself to liability by incorrect action or delay.

We have considerable experience with these issues and could help you manage difficulties in this area.

Key takeaways

- Purchasers of off-the-plan apartments face significant risks, including potential defects and legal liabilities.
- Recent legislation has introduced new protections for purchasers, but rights under contracts are often limited.
- Legal advice is crucial for understanding and exercising rights related to contract termination or rescission.
- Actions taken by purchasers can impact their legal standing, especially regarding contract affirmation.
- Reviewing contracts and understanding legislative changes can provide avenues for recourse in problematic purchases.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

Prepared by Bannermans Lawyers
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BANNERMANS LAWYERS
T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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