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| |  |  | | --- | --- | | |  | | --- | |  | |  |  |  | | --- | --- | | |  | | --- | | **https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/bed454f5-374e-46e6-a733-ff8ea431817c.jpg** | | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | |  | | --- | | November Newsletter  https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/1a052785-379a-42c9-b86a-4355d2091340.jpg  ***Purchaser's rights when buying off-the-plan contracts***  **Background**  Off-the-plan contracts often resemble telephone directories many inches thick which contain complex clauses and conditions often typed in fine print. It is important that, notwithstanding that complexity and fine print, all off-the-plan purchasers gain a reasonable understanding of their obligations and limited rights before they decide to enter into a binding contract.  The purchaser’s solicitor’s role is *not* to advise about the commercial or financial advisability of the proposed purchase but, instead, to ensure that a purchaser makes *an informed decision*:   1. about whether or not to proceed based upon a sound understanding of the legal consequences of entering into the proposed purchase contract; and      1. as to the limited rights and options the purchaser has when something goes wrong.   Sometimes, a purchaser’s solicitor requests amendments or variations to the detailed sale contract prepared by the vendor’s solicitor with a view to protecting the purchaser’s interests. Vendors of off-the-plan contracts, however, rarely agree to any such variations or amendments, and, in consequence, the purchaser is often presented with an ultimatum of *‘Take it or Leave it’.*  Accordingly, it is generally a matter for the purchaser to decide whether he or she is prepared to enter into a contract which provides flexibility and protections for the vendor and little by way of rights and options for the purchaser. It is not an enviable choice for a purchaser who has to weigh the possible benefits of an investment which may, although not necessarily, appreciate in value over time, against the many downsides associated with entering into a one-sided off-the-plan contract.   Often the off-the-plan contracts generally provide minimal protections required by law for purchasers. Minimal rights which purchasers are granted, generally include *a right of rescission*(or the right to the refund of the deposit and to walk away) when any of the following events occur:   1. a Development Approval made by the vendor gets rejected by the local council;      1. the vendors present a replacement Strata Plan to the local council which, if accepted, would result in the purchaser receiving less than 95% of the area of the apartment originally promised by the vendors;      1. a Strata Plan is not registered by the “sunset date”;      1. an unforeseeable event such as inclement weather, civil commotion or strikes occurs.   Walking away from a contract is unlikely to be attractive option. Whilst a purchaser will be pleased to receive the return of their deposit, possibly, but not necessarily, with some accrued interest, having had that deposit tied up for, say, 2-3 years, may have resulted in the purchaser not purchasing another property and, thereby, suffering a potential financial loss.   Purchasers should be aware that, whilst they have the right to walk away from the purchase if the strata plan is not registered by the “sunset date”, vendors in New South Wales and Queensland also have that right, which can give rise to unfortunate consequences and disappointment for the purchaser.   Sue Williams writing in the Sydney Morning Herald on 7 September 2015 reported that buyers of seven apartments in a boutique Surry Hills building for which they had paid deposits 2-3 years previously, were no longer able to settle the purchase because the development was running late and the vendors exercised their right to rescind the contracts. Ms Williams referred to a 2 bedroom apartment that was originally bought for $915,000  where the developer rescinded the contract because the development was running late and the apartment was then back on the market for $1.39 million a short time after the vendor’s rescission.   *What rights does a purchaser have when a replacement Strata Plan document reduces what the purchaser is to receive by more, or less, than 5%?*   Given the current rise in property values in the Sydney housing market over the last 3 years, simply rescinding the purchase contract and walking away is rarely an attractive option to a purchaser when a vendor informs a purchaser that there is to be a significant reduction in the size of the apartment.  It’s not an attractive option because Sydney real estate property prices have risen by 32% over the 3 past years.[[1]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn1" \o ") Where prices are rising at such a significant rate, it often makes little sense for a purchaser to walk away from the purchase in the circumstances where the value even of a significantly smaller apartment is often higher than the original contract price and the price of comparative second-hand apartments.  Can a purchaser attempt to compel vendors to comply with the terms of the original contract? What is a prospective purchaser to do in these circumstances? Sadly, notwithstanding requests by the purchasers’ solicitors for variations in, and amendments to off-the-plan contracts with a view to providing some protection for the purchaser, in practice the purchaser usually has no choice other than to decide whether to ‘*Take it or Leave it’* as generally when a purchasers’ solicitor requests an appropriate amendment to the draft contract, the response is invariably to the effect ‘No’ – “If you don’t like it – you know what you can do!”.  In theory, a purchaser's solicitor should request that a clause be inserted into the off-the-plan contract to provide that, in the event that the size of the apartment is less than that originally agreed, there is a corresponding and proportionate reduction in the purchase price at settlement. However, given the likely response of the vendor, a purchaser should not be overly optimistic in this regard.     **Specific Performance**  A court will rarely make an order against a developer vendor for *“specific performance”* as, in many cases, courts conclude that an order for the contract to be *“specifically performed”* by the vendor cannot reasonably and/or practicably be enforced. In the event where a replacement Strata Plan contains significant discrepancies from the original draft Strata Plan, it is unlikely, on practical grounds, that a court will order the vendor to construct the building apartment in question in accordance with original draft Strata Plan as it is unlikely to be practicable to do so.   **Other Remedies**  A claim for damages for *misleading and deceptive* conduct may be available to a purchaser and whoever is subsequently affected in relation to failure of the vendor to notify a purchaser of adverse changes to the size of purchaser’s property at the time the changes were made. Such a claim may be characterised as a claim of misleading and deceptive conduct *by silence*.  The leading case on silence as misleading and deceptive conduct is in *Demagogue Pty Limited v Ramensky* [1992] FCA 557; (1992) 39 FCR 31, 32 where Black CJ said:   ‘*Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive … to speak of “mere silence” or a duty of disclosure can divert attention from that primary question. Although “mere silence” is a convenient way of describing some fact situations, there is in truth no such thing as “mere silence” because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed*.’   The Courts have been willing to imply a duty of good faith on a party to an off-the-plan agreement. Arguably, the conduct of a vendor in failing to notify a purchaser of their proposal to reduce the size of the apartment as soon as such a decision was made could constitute misleading and deceptive conduct by silence, particularly if the vendor delays significantly in informing the purchaser of the proposed reduction.  **Australian Consumer Law**  The Australian Consumer Law may also provide consumers with a right of action against a trader where there is a failure to comply with a consumer guarantee, i.e. consumer goods or services must be of “acceptable quality”. However, the remedy will depend on whether the failure is considered major or minor and may allow a purchaser to recover any reasonable costs incurred in fixing a problem.   **Conclusion**  It is important for off-the-plan purchasers to:   1. obtain reliable legal advice to enable the purchaser to make an informed decision about what their many contractual obligations and limited rights are before deciding whether or not to proceed; and      1. instruct their solicitors to at least attempt to make appropriate amendments to the one-sided contract with a view to creating an even playing field even if, as is likely, such requests are met with a flat refusal.   They should also:   1. make enquiries about the reputation, experience and bona fides of the vendor and its directors and shareholders. For example, have they been associated with a company that has gone into liquidation only to be replaced by a “phoenix company” arising from the ashes of the first company?;      1. seek financial and commercial advice from their financial advisor, accountants and bankers about the commercial prudence of proceeding with the proposed purchase and the land tax, income tax and capital gain tax implications of proceeding with the purchase; and      1. seek advice as to value from those qualified to provide it such as certified valuers and experienced real estate agents.     Minji Kim      [[1]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref1" \o ") On average, approximately 10.8% per year from March 2012 to March 2015 based on the Australian Bureau of Statistics Residential Property Price Indexes, <[www.abs.gov.au/AUSSTATS/abs@.nsf/second+level+view?ReadForm&prodno=6416.0&viewtitle=Residential%20Property%20Price%20Indexes: %20Eight%20Capital%20Cities~Mar%202015~Latest~23/06/2015&&tabname=Past%20 Future%20Issues&prodno=6416.0&issue=Mar%202015&num=&view=&](http://www.abs.gov.au/AUSSTATS/abs@.nsf/second+level+view?ReadForm&prodno=6416.0&viewtitle=Residential%20Property%20Price%20Indexes:%20Eight%20Capital%20Cities~Mar%202015~Latest~23/06/2015&&tabname=Past%20Future%20Issues&prodno=6416.0&issue=Mar%202015&num=&view=&)>.                       https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/a860ff05-1370-412e-9f01-7b1fbdb5a7e8.jpg  ***“Of little to no consequence: ‘consequential loss’ and similar exclusions of liability in Australian contracts”***   Frequently, a party to a contract will want to limit their liability for breaches of the contract to losses which are a direct consequence of that breach.  In this context, you may see a term in the contract which excludes liability for ‘*consequential*’ or ‘*indirect*’ loss resulting from a breach of the contract. Parties may want to limit their liability for consequences of their failures which they could not foresee.   It is usually not enough, however, to simply state broadly in the contract that liability for ‘*consequential loss*’ is excluded. This article will briefly examine how Australian courts have approached terms such as consequential loss, and the implications of this approach for drafting commercial contracts.   **What does “consequential loss” mean?**   The case of *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd****[[1]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn1" \o ")*** dealt with a contract that purported to exclude one party’s liability for ‘consequential loss’.   In *Peerless*, Environmental Systems Pty Ltd included one term in the contract that its liability was limited solely to workmanship and materials, and another term stating that it did not accept liability for ‘consequential loss’.[[2]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn2" \o ")   Justice of Appeal Nettle stated that in interpreting what was included in the term ‘consequential loss’,  the starting point was the “natural and ordinary meaning” of the term, as an ordinary businessperson would understand it .[[3]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn3" \o ") Justice of Appeal Nettle further said that an ordinary businessperson would view ‘consequential loss’ as being anything beyond ordinary damages for breach of the contract, and would include losses such as loss of profits or any other expenses incurred in response to the breach.[[4]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn4" \o ") As a result, Environmental Systems Pty Ltd were liable to Peerless Holdings Pty Ltd for supplying faulty equipment, but not for the extra labour costs incurred by Peerless Holdings Pty Ltd in attempting to make the equipment function as desired.[[5]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn5" \o ")   Rather than entirely accepting Justice of Appeal Nettle’s judgment as laying down an exact meaning for terms like ‘consequential loss’, subsequent cases have taken the view that the approach in *Peerless*demonstrates that the meaning of ‘consequential loss’ and similar terms when they arise in contracts is never fixed. Instead, the meaning in any particular instance must be determined in the context of the contract as a whole, and also in light of the features of the business arrangement between the parties.[[6]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn6" \o ")   **Factors relevant to interpretation**   In light of the direction the courts have taken, it can be useful to consider some of the key factors of a contractual relationship which may affect how broadly a term such as ‘consequential loss’ is interpreted.   There are a number of factors that could be relevant, including:   1. whether the clause attempting to exclude liability for ‘consequential loss’ or similar losses is clearly and unambiguously worded;      1. the nature of the commercial venture. For example, in In *Re Westsub Discounts Pty Ltd v Idaps Australia Limited* [1990] FCA 108, a seller of a product entered into a contract that was quite unprofitable for it compared to the perspective of the buyer. In this context, it was considered understandable that the seller’s liability to the buyer was intended to be limited;      1. the relative bargaining strength of the parties and whether they have both received legal advice;[[7]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn7" \o ") and      1. Whether the contract is ‘internally consistent’ in how it deals with the meanings of words and the rights and liabilities of the parties. For example,  in *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd [No 2]* [2013] WASC 356, the defendants argued that the contract set out a comprehensive regime of remedies for breach of the contract which excluded any common law rights. In this case, Justice Kenneth Martin held that such rights were not excluded, as the contract was not consistent as to how it referred to or treated such rights.[[8]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn8" \o ") In some parts of the contract common law rights were clearly excluded, but in others the terms of the contract were much less firm.[[9]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftn9" \o ")   **Implications for contractual drafting**   As each clause excluding liability for ‘consequential loss’ is interpreted in its own context, while it is possible to know in advance what features of a contractual relationship might be relevant, it is never possible to know whether or not a clause simply referring to ‘consequential’ or ‘indirect’ loss will have the breadth of effect which the parties may expect.   As a result, it is usually more prudent to provide a comprehensive list of the forms of damage which are intended to be excluded, or at least provide a reasonable list of examples of what the contract means by terms such as ‘consequential loss’ or ‘indirect loss’. In this way, a contract can provide more certain protection against a particular liability, and can also provide guidance to a court as to how wide an exclusion of liability was intended to be.    Ashley Rihak    [[1]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c#_ftnref1) (2008) 19 VR 358 (“*Peerless*”).  [[2]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref2" \o ") Ibid [5].  [[3]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref3" \o ") Ibid [93].  [[4]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref4" \o ") Ibid.  [[5]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref5" \o ") Ibid [94].  [[6]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref6" \o ") See, eg, *SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd* [2011] WASCA 138, [25]; *Regional Power Corporation -v- Pacific Hydro Group Two Pty Ltd* *[No 2]* [2013] WASC 356, [68]; *Macmahon Mining Services v Cobar Management* [2014] NSWSC 731, [14]-[23].  [[7]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref7" \o ") See, eg, *Transport (SA) P/L v Cavill Power Products P/L & Anor* [2009] SADC 77.  [[8]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref8" \o ") *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd [No 2]* [2013] WASC 356, [38].  [[9]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=f339fbc25c" \l "_ftnref9" \o ") Ibid.    Employee spotlight  Esther Kim  **Solicitor**  https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/ad456958-d0d4-400d-be4e-745e6567f1e8.jpg  We recently said “goodbye” to Esther Kim after she relocated to South Korea. Esther began working for Clive Mills and Associates in October 2011 after completing a Bachelor of Law and Commerce at the University of Sydney. Esther has a reputation for professionalism and efficiency in the areas of commercial and domestic conveyancing. Esther will be greatly missed by her many clients and by all of her colleagues. We all wish Esther and her husband, Jun, well for the future.    Ashley Rihak  **Solicitor** https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/803a40e1-a294-462b-ad69-84fcf254c557.jpg  We’d like to congratulate our newly practising solicitor Ashley Rihak on being admitted as a lawyer of the Supreme Court of NSW on the 9th of October, 2015. Ashley was granted his practising certificate by the Law Society of NSW on the 29th of October, 2015. He received a Bachelor of Laws with Honours and a Bachelor of Arts from the University of Tasmania in 2014. | | | | |