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| |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | | |  |  | | --- | --- | | |  | | --- | | September Newsletter  https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/dd9e69be-b4e7-49b5-b40f-601e5e44a24f.jpg  ***Grantor’s Remorse?: “Tell ‘em they’re dreaming!”***    The disappearance of the type of freestanding house on a quarter acre block depicted in *The Castle*and cranes dotting the radically changing Sydney skyline will be familiar to most Sydneysiders.   Here in St Leonards (or *“Little Manhattan”* as it is becoming known), office buildings of 4 storeys or less are disappearing and being replaced by towering mixed commercial and residential buildings of between 11 and 20 plus storeys with very little parking.   For most of us, the resultant loss of sunlight filtering through to us at ground level and the inability to find a parking space appear to be the price we collectively pay for progress.   But:   1. what does this mean to those who sell their castle to developers?      1. how does the process work?      1. what is the relevant law? and      1. is everyone a winner?   ***The Process***     Developers approach owners who, unlike Michael Caton and his family, *the Kerrigans*, in The Castle, are often keen to sell when what appears to be an excellent price is offered.   It often seems to the owners that, if anyone is “*dreaming”*, it’s the developers who seem to be throwing vast amounts of cash at the vendor with gay abandon as if there is, or will be, no tomorrow.   The vendor generally proposes that the vendor grant the developer an option to purchase the castle at a specified price within a specified time-frame.   If the specified price is, say, $1.1M and the owner believes the home is not worth more than $1M, then it seems that everyone is going to be a winner.   The developer agrees to pay a fee for the grant of the option, which the developer will forfeit if they decide not to proceed with the purchase.   It seems like a fantastic deal for the vendor, whether or not the developer proceeds. What could possibly go wrong?    ***Sydney***     Sydney housing prices have risen on average by around 32% over the past 3 years (on average, approximately 10.8% per year from March 2012 to March 2015, based on ABS figures).   If the developer, bless him, elects not to exercise the option until the last possible moment, often 2 years after the grant, then The Castle may have risen in value by around $200,000-$300,000.   At this point, when the Kerrigan’s neighbours are selling their homes for far more, the option may not seem to be such an attractive proposition, and the Kerrigans are looking at losses in real terms of around $100,000 to $200,000.   At this point, the Kerrigans are like to call their solicitor, perhaps Denis Venuto, who, after dictating his letter of advice, swivels in is chair to type his letter of advice to the Kerrigans detailing their prospects of successfully avoiding the terms of the option agreement. His advice will hopefully not be based solely on *“the vibe”.*     ***What is the Vibe in relation to Options?***     In a case of “*grantor’s remorse*” such as this, what precisely is the legal position?   [Part 4, Division 9 of the *Conveyancing Act 1919* (NSW)](http://www.legislation.nsw.gov.au/fragview/inforce/act+6+1919+pt.4-div.9+0+N?tocnav=y) creates rules that govern option agreements. These rules may be, and some are, used to escape an option agreement that is not fully compliant.   For example, section *66ZI(2)(a)* requires that a copy of the proposed contract for sale be attached to the option agreement at the time that the option is granted. In our experience this does not always occur. This section also requires that the attached contract include the particulars of the purchase price. Where the contract is not attached, or the purchase price is omitted from an attached contract, either party can, up until the date when the option is exercised or can no longer be exercised, serve a written notice on the other party to *rescind* the option (section 66ZI(1) and (4)).   Alternatively, a remorseful grantor might look to the option agreement itself for a way out.   The settled position is that options to purchase property must be exercised in a manner that is strictly in accordance with their terms (see *Foster v Archer*[2012] TASFC] 4 (20 November 2012) at [13], and *Parras and Ors v Fai General Insurance Company Ltd (Prov liq apptd)*[2001] NSWSC 1077 (23 November 2001) at [2]).   For example, if an option agreement specifically states that on the exercise of an option a deposit must be paid, less the amount of the option fee, a party may be considered to have invalidly exercised an option where they attempt to deduct from the deposit, in addition to the amount of the option fee, any additional fees that have been paid by the developer to extend the period of the option.   Numerous other technicalities may, perhaps, be sought out and relied upon by a remorseful grantor. For instance, in the contract for sale. The standard Contract for the Sale of Land at clause 20.6.1 states that a document relating to the contract is ‘signed by a party’ if it is signed by their solicitor. A document related to the contract may arguably be considered to be invalidly executed where, for example, one party’s solicitor witnesses another party’s signature, but does not themselves sign the document.     ***Conclusion***     There is a great deal of case law relating to options to purchase and/or sell real estate.   Care and skill are required by all concerned including the grantor, the grantee and their respective solicitors. The latter need to have careful regard to not just “*the vibe*”, but also the particular provisions detailed in Part 4, Division 9 of the *Conveyancing Act*and the terms of the option agreement.       Clive Mills | | | |  | | --- | | https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/a860ff05-1370-412e-9f01-7b1fbdb5a7e8.jpg  http://gallery.mailchimp.com/653153ae841fd11de66ad181a/images/transparent.gif  ***Are All Obligations Created Equal?: Indemnities vs Guarantees in Contractual Relationships***   ‘Indemnities’ and ‘guarantees’ are two concepts that can arise in a contractual relationship. Both an indemnity and a guarantee will usually require one party, “*A*”, to pay the other party, “*B*”, an amount of money when a particular event occurs. There are, however, some significant differences between the two kinds of arrangement. Below, I will seek to draw out some of these differences by examining how these two kinds of arrangements are created, how the obligations to pay under these arrangements are triggered, and how indemnifiers and guarantors can be released from their obligations.   ***How Indemnities and Guarantees are made***   An indemnity will usually appear as a provision in a contract between the relevant parties. Let’s say, for example, that A and B enter a contract in which A will overhaul a generator for B. The contract might include, if A’s lawyers have not been doing their job properly, a term stating that A will “*indemnify*” B for any damage whatsoever that B suffers as a result of any third party’s actions or injuries on the building site, whether caused by A or not. In the event that B becomes liable to a third party for something occurring on the site, A must wholly reimburse B for any loss that B incurs as a result.   A guarantee, by contrast, will often take the form of a “*collateral contract*”[[1]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn1" \o "). In this scenario, B enters into a contract with another party, “*C*”, where C will be carrying out the overhaul. B then enters into a separate contract with A, where A guarantees to pay an amount of money to B in the event that, for example, C breaches a term of its contract with B by using incorrect materials in the overhaul.[[2]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn2" \o ")   Whereas an indemnity is a promise to hold B harmless arising directly from the contract between A and B, a guarantee is a promise to answer for a breach, default, etc arising under a contract entirely separate to the guarantee itself.   ***Triggers***   As the above examples show, guarantees usually only become enforceable following the “trigger” of certain conduct by C.[[3]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn3" \o ")Where C, for example, breaches a term of the contract, fails to complete the project within a specified timeframe, or is otherwise in default, B can enforce the guarantee against A.   Contractual indemnities do not need to be so limited. You can create an indemnity to apply to practically any event,[[4]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn4" \o ") although, as noted above, a good lawyer ought to try and limit as much as possible any indemnities owed by their client to the other party. Indemnities are also used as a means of risk allocation, where, for example, B is the party who is liable to a third party in some respect, but A is able to obtain insurance to cover that amount.[[5]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn5" \o ") A might then offer an indemnity to B, as it is in a position to cover that liability without significant loss to itself.   ***Release/Discharge*** Usually, a guarantee will allow for certain circumstances where the guarantor, A, can be released from their obligation to pay B. The common position will be that if B breaches its contract with C, A no longer has to provide a guarantee to B in respect of C’s conduct under the contract.[[6]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn6" \o ")   An indemnity does not necessarily end just because the indemnified party, B, has breached any terms of the contract between it and A.[[7]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn7" \o ") Indeed, the indemnity may expressly provide that A indemnifies B in relation to particular breaches of the terms of the contract. As a result, the ability to escape from an indemnity will depend largely on the terms of the individual contract. It may, however, be possible to escape an indemnity where B has changed the terms of the contract since the indemnity was provided in a way which is “*material*” to A.[[8]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn8" \o ")   This last principal also applies to a guarantee.[[9]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn9" \o ") Where B has materially altered its contract with C, A can no longer be expected to guarantee C’s conduct as what the contract requires of C may have changed significantly since the guarantee was entered into.   ***Conclusion***   Hopefully some of the above can assist in differentiating an indemnity from a guarantee. There are some important differences between the two in terms of the parties usually involved, the vehicle utilised for the arrangement, and how they operate and are enforced. It is essential to keep these differences in mind, as it is the *effect****[[10]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftn10" \o ")*** of an arrangement that a court will look to in order to determine whether it is an indemnity or a guarantee.       Ashley Rihak    [[1]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref1" \o ") *Sunbird Plaza Pty Ltd v Maloney*[1988] HCA 11, [3].  [[2]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref2" \o ") Ibid.  [[3]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref3" \o ") *Caltex Australia Petroleum Pty Ltd v Troost*[2015] NSWCA 64, [50] (‘*Caltex*’).  [[4]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref4" \o ") Ibid [50]-[51].  [[5]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref5" \o ") Hayford, Owen 2005 ‘Project Insights: Drafting and Negotiating Indemnities’, <<http://www.claytonutz.com/publications/newsletters/projects_insights/20051108/drafting_and_negotiating_indemnities.page>>.  [[6]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref6" \o ") *Canty v PaperlinX Australia Pty Ltd*[2014] NSWCA 309, [40].  [[7]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref7" \o ") Ibid.  [[8]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref8" \o ") *Caltex* [2015] NSWCA 64, [53].  [[9]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref9" \o ") Ibid.  [[10]](http://us4.campaign-archive2.com/?u=d7ac35d590989fce96f6014e9&id=04bbb38c83" \l "_ftnref10" \o ") Carter, John et al, ‘Contract’ in *Halsbury’s* *Laws of Australia*, [110-995]. | | | |  | | --- | | Employee Spotlight  http://gallery.mailchimp.com/653153ae841fd11de66ad181a/images/transparent.gif  Sally Kim  **Solicitor https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/86fd12f2-873d-46bd-b70d-baebf86299d7.jpg LLB/BA in International Studies (UTS)**   I joined Clive Mills & Associates in June 2015 and I was admitted to Supreme Court of New South Wales on 21 August 2015.   Property Law and conveyancing have been interests of mine since I started working as a paralegal at Toltz Lawyers back in 2014, a boutique law firm based in Neutral Bay specialising in Property Law. I gained valuable experience at that firm which eventually became a stepping stone for my career. Working at Clive Mills & Associates so far has further widened my knowledge and experience about property law.   I am looking forward to developing ongoing professional relationships with clients using my knowledge, skills and experience here at Clive Mills & Associates.  Minji Kim  **Solicitor https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/61b501bb-ed19-4ee2-a5ca-02e4de12d780.jpg  LLB/ BEc**  Minji graduated from the University of Sydney in 2014 with a combined Bachelor of Economics and Laws. Minji was admitted as a solicitor to the NSW Supreme Court in July 2015. She joined Clive Mills & Associates in June 2015 and has been assisting the firm's clients in relation to property acquisitions and sales and in commercial litigation.    Professional Qualifications:    ·         Admitted to Practice in the State of New South Wales (July 2015)    Professional Educations:    ·         Graduate Diploma in Legal Practice (2015) – College of Law  ·         Bachelor of Laws (2014) – University of Sydney  ·         Bachelor of Economics (2013) – University of Sydney    Languages:    ·         English  ·         Korean  ·         Japanese  Ashley Rihak  **Paralegal**  https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/efe5dd86-4c85-48a7-9338-5d32d9cebb50.jpg  **BA LLB (honours)**  Ashley graduated from the University of Tasmania in 2014 with a combined Bachelor of Arts and Bachelor Laws degree with honours. Before joining Clive Mills & Associates, he completed legal internships with the Office of the Anti-Discrimination Commissioner in Tasmania and with Alstom Ltd in New South Wales. Currently working as a paralegal, Ashley will be admitted as a solicitor in October 2015.  Peyton Bernhardt  **Administrative Assistant** https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/a54d74b2-f268-413e-98d8-aeb3f999c10a.jpg   Peyton is currently studying a Bachelor of Laws majoring in Corporate and Commercial Law at Macquarie University on a Merit Scholarship. She was recently awarded the Bernard Curran Memorial Prize by the Academic Senate for the most meritorious pass in the New South Wales Higher School Certificate examination in 2014.     https://gallery.mailchimp.com/d7ac35d590989fce96f6014e9/images/bee66036-13ba-4457-b6c5-a01c75ba25c9.jpg | | | |