

Insights / Property

Sunset clauses can leave you in the dark



by: Jenny Turner, Partner. Originally published in NZ Property Investor



It pays to be au fait with the details of property contracts - especially the sunset clause!

With the challenges facing the construction sector, difficulties in deducting loan interest as an expense, and Healthy Homes legislation that requires capital investment to bring existing properties up to standard, many are considering buying "off the plan." "Off the plan" refers to signing up to buy a future property, typically subject to completion of a subdivision of the land and a new-build dwelling.

On the face of it this all seems relatively straightforward and risk-free. However, in the current construction environment there may be obstacles to a straight run, so it pays to be fully au fait with the details of the contract - especially the sunset clause.

Generally, a developer takes new properties to market in the early stages, before obtaining consents and beginning construction, to obtain unconditional sales and therefore secure finance before incurring significant development costs and committing to the project. Sale contracts in this context often have what is known as a sunset clause. Traditionally sunset clauses allowed a purchaser to cancel the contract if the development wasn't completed by a particular "sunset date," and the deposit was refunded. The intention of these clauses is to protect either party from unforeseen delays.

Higher prices

However, it is becoming increasingly common for sunset clauses to be drafted in a way that the developer, too, has an ability to cancel the contract on the sunset date. This has resulted in some developers using their ability to cancel on the sunset date as leverage to request the contracted purchaser to pay a higher purchase price to keep the contract alive.

A developer may seek to do this to recover increased building costs, or to take advantage of increases in market value between the contract date and the sunset date. As a purchaser, you need to understand how the sunset clause in your contract operates so you have certainty around your investment, especially the property purchase price.

A purchaser should be aware of the details of a sunset clause before entering a contract to purchase a property off the plans. It is important to be aware of key timeframes in a development. If a sunset date is three years from the date of the contract, but the development is well advanced with an estimated date of completion of six months, it may be appropriate to ask the sunset date to be brought forward. Or a purchaser may agree to that sunset date on the basis that the risk of cancellation is low.

If possible sunset clauses, together with other clauses that allow the developer to unilaterally cancel the contract at a later stage in the development, should be deleted. Deleting these clauses will typically protect a purchaser by ensuring the developer cannot use the threat of cancellation as leverage to request an increase in the purchase price.

Vendor warranty

Developers will be restrained by lending conditions and the need to protect their commercial position against some uncertainty. Typically, contracts will include conditions for the benefit of a vendor and a force majeure clause in addition to the right for a developer to cancel on the sunset date. In those cases it may be appropriate to request a vendor warranty where the developer warrants they will not use any cancellation rights to ask the purchaser to pay a higher purchase price, or to cancel for the purpose of immediately selling the property to another buyer.

This ensures a developer's interests are suitably protected so it can cancel the contract if the development does not proceed for valid reasons, while the purchaser knows the developer can't take advantage of these clauses to increase contract prices.

With these protections in place, a key aspect of due diligence is to ensure the developer has the means to complete the project on time. This avoids the need for either party to cancel on the sunset date leaving the purchaser with their deposit refunded without any return on those funds and in a market where property prices have increased. Some developers are reluctant to amend the conditions in their contracts, but a purchaser buying off the plans should always discuss their options with their own solicitor before signing up.

While many terms may be non-negotiable from a developer's perspective, some aren't. A purchaser can often improve their contractual purchase position during the pre-contractual negotiations or the conditional period. Whether renegotiating sunset dates or requesting further changes for the purchaser's benefit at little risk to the developer, small changes to the contract may well ensure greater certainty and confidence in your choice to purchase "off the plans."



Download this article in PDF format

Disclaimer

The information in these articles is general information only, is provided free of charge and does not constitute legal or other professional advice. We try to keep the information up to date. However, to the fullest extent permitted by law, we disclaim all warranties, express or implied, in relation to this article - including (without limitation) warranties as to accuracy, completeness and fitness for any particular purpose. Please seek independent advice before acting on any information in this article.

RELATED ARTICLES

How to use a property lawyer

Specialist property lawyers can save you thousands - or help you get out of a sticky situation.

[Read more](#)

Subdividing your property?

In recent years, there has been a real shift in the policy framework around residential development.

[Read more](#)

WYNN WILLIAMS

Get in touch / Account payment / Privacy policy / Terms of engagement / Disclaimer



Wynn Williams Auckland
Level 25, Vero Centre, 48 Shortland Street, Auckland 1010, New Zealand. PO Box 2401, Shortland Street, Auckland 1140.
+64 9 300 2600
email@wynnwilliams.co.nz

Wynn Williams Christchurch
Level 5, Wynn Williams House, 47 Hereford Street, Christchurch 8013, New Zealand. PO Box 4341, DX WX11179, Christchurch 8140.
+64 3 379 7622
email@wynnwilliams.co.nz

Wynn Williams Queenstown
Level 2, Te Nuku Building, 43 Ballarat Street, Queenstown 9300, New Zealand. PO Box 323, Queenstown 9348.
+64 3 379 7622
email@wynnwilliams.co.nz