



Checklist for advising vendors when purchasers default

Advice practitioners need to give vendors when purchasers are in breach of the contract, to enable the vendors to make an informed decision.

Many of these issues are also relevant to advising purchasers who have breached the contract.

Contract of sale

- Explain the relevant conditions in the contract dealing with the breach.

Breach

- Give the vendor details of the breach.

For example, the purchaser failed to pay the balance on the due date. It makes sense to also tell the client the actual amount due at settlement and provide practical suggestions, such as the need to re-organise any removalist.

Penalty interest

- Give the vendor details of the penalty interest payable including rate and amount per day.

Conduct of vendor

- Seek instructions from the vendor as to whether the vendor is ready, willing and able to settle.

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- Seek instructions from the vendor as to whether the vendor has had any discussions directly with the selling agent, purchaser or purchaser's representative about the breach.

It may be that the conduct of the vendor has resulted in time no longer being of the essence or the vendor may have waived their rights to take any action. If this is the case it will impact on the advice you give about issuing a rescission notice (for example, you may need to make time of the essence again).



Without prejudice discussions

- Raise with the vendor that it may be appropriate for you to contact the legal representative for the other party, on a without prejudice basis, to discuss the breach.

It may be that the other party is willing to pay an additional amount to avoid the costs of the default and/or to extend the settlement date and the vendor may accept this.

Default notice v rescission notice

- Advise the vendor a default notice needs to:
 - specify the default and provide a time frame for the default to be rectified
 - be issued if the vendor wants to enforce the contract.

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- Advise the vendor a rescission notice needs to:
 - specify the default and provide a time frame for the default to be rectified
 - be issued when time is still of the essence, and
 - be issued if the vendor wants to rescind the contract if the purchaser fails to comply with the contract.

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- Advise the vendor if they serve a rescission notice and validly rescind the contract:
 - they are entitled to possession of the property
 - they have a right to keep the deposit
 - they are still liable to pay the estate agent's commission and expenses. Rarely does an agent's sales authority make payment subject to settlement. This is certainly not a standard term.
 - they are entitled to keep the property and sue for damages but must do this within one year of the contract ending
 - they are entitled to resell the property and recover any deficiency in the price from the purchaser but must do this within one year of the contract ending
 - the forfeited deposit is taken into account in calculating any damages.

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- Advise the vendor that where a rescission notice is issued the purchaser's lender may withdraw their offer to provide the loan amount and this will mean settlement is unlikely to occur.

This highlights the need to raise with the vendor the option of speaking with the purchaser's representative about the vendor's proposed course of action.



- Advise the vendor:
 - the vendor must be ready, willing and able to complete the contract
 - the purchaser may issue proceedings to contest the notice
 - the vendor may need to issue proceedings to enforce their rights to rescind.

For example, to remove a purchaser's caveat once the contract is rescinded.
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- Obtain written confirmation from the vendor whether they want to enforce the contract or rescind it.

The notice

- Ensure the vendor is ready, willing and able to complete the contract.
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- Ensure the purchaser's default and the action required to be taken by the purchaser to remedy the breach is clearly specified in the notice.
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- Ensure the notice observes all requirements of the contract of sale.
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- Because of the potentially litigious consequences associated with a disputed notice, it is advisable to have the notice peer reviewed by a colleague within your office or by a barrister for technical accuracy and compliance with the contract of sale.

Costs

- Inform the vendor as soon as a breach occurs:
 - that this is not part of the initial quote for the conveyance
 - whether you will continue to act in relation to the breach or need to refer it to someone who has expertise in the area
 - an estimate of the costs of dealing with the breach.
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- Explain that the vendor is primarily liable to pay these costs but that a proportion of them are usually recovered from the purchaser and paid when settlement occurs.
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- Explain that if settlement does not take place the vendor will need to pay the practitioner's legal costs of dealing with the breach.



Insolvent purchaser

- Advise the vendor that sometimes a purchaser and any guarantor under the contract may be insolvent which will impact on the prospect of recovering any damages in addition to the deposit.
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- Seek instructions to obtain relevant searches to check things like whether the purchaser is a bankrupt or a company is under administration.

Briefing a barrister

- Seek instructions before briefing a barrister and consider the need to obtain funds up front from the vendor to cover the barrister's costs.
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- Refer to the LPLC practice risk guide [Commercial litigation – staying alert](#) for risk management tips on briefing a barrister including:
 - brief competent counsel with full instructions, including a copy of the complete contract of sale and a chronology of relevant facts and circumstances.
 - communicate effectively with counsel so all relevant issues are canvassed, and deadlines are met.