



HOW TO AVOID AN OFF-THE-PLAN CLAIM

Whether acting for vendors or purchasers in off-the-plan sales, there are risks you need to be aware of and things you can do to avoid them.

Acting for vendors

Claims against practitioners acting for vendors include:

- transferring the wrong lot on a plan of subdivision
- the contract for the sale of a lot on an unregistered plan of subdivision not complying with s9AA of the *Sale of Land Act 1962 (Vic)* (SLA) regarding how deposit monies are to be held, giving the purchaser the right to rescind under s9AE(1)
- not promptly registering the plan of subdivision within the sunset period, giving the purchaser a right to rescind under s9AE(2)
- not advising on the need for owners corporation insurance as required by s11
- ambiguous or non-existent special conditions identifying the responsibility of the parties for certain works.

Acting for purchasers

Practitioners acting for purchasers have been sued for:

- not spotting a s9AA or 9AE(2) breach by the vendor, depriving the purchaser client of the opportunity to rescind
- not transferring car parks or accessory units
- not telling the client quickly enough that the occupancy permit was issued and when settlement would be, leaving the client insufficient time to procure finance or arrange a pre-settlement inspection
- not detecting a material difference between the proposed plan of subdivision in the contract of sale and the plan finally registered, such as a reduction in the lot size, a change in the boundary or an easement being added.

In one claim, a purchaser of an off-the-plan apartment was given marketing material indicating the property had certain dimensions. After settlement, the purchaser discovered the developer had amended the plan of subdivision and the apartment's dimensions "as built" were significantly smaller. The purchaser then claimed the practitioner failed to warn her the plan could be amended and to check the measurements before settlement, and failed to take proactive steps to detect any revisions.

The matter was handled by a busy inexperienced clerk working with little supervision. There was no evidence the purchaser had been given advice on any substantive matters, particularly her right of rescission under s9AC(2).

Risk management

Take instructions about what the client thinks they are buying (eg location, dimensions, finishes, car parks) and review the contract to see that it accords with these instructions.

Whether acting for vendor or purchaser, always carefully consider sunset clauses and the advice your client needs in the circumstances. Where a dispute about termination of a sunset clause arises, seek the advice of experienced counsel early, as such disputes are usually complex and getting it wrong can be expensive.

Check you have advised the purchaser client on the current plan of subdivision, including any material amendments to earlier versions you advised on. Look out for revisions prior to settlement and the possibility the vendor may have failed to notify the purchaser about them.

When acting for a vendor of a lot on an unregistered plan, ensure your precedent contract complies with the obligations imposed by the SLA. Warn the vendor of the consequences of any breach, including that the purchaser may rescind. Give specific advice about ss9AA, 9AB, 9AC, 9AE(1) and 9AE(2).

Where a lot is affected by an owners corporation, warn the vendor that unless the owners corporation has insurance as required by s11, the purchaser may avoid the sale at any time before settlement.

When acting for a purchaser, check compliance with the vendor with the SLA's obligations and, if there is non-compliance, advise your client of the right to rescind.

Ensure your client is aware of the expiry date for any planning permit and the consequences for failing to meet the deadline. Unless there is a contrary provision, a planning permit for the subdivision of land expires five years after certification of the plan of subdivision. See s68(1)(b) of the *Planning and Environment Act 1987 (Vic)*. Once the period expires, the plan of subdivision will need to be recertified by the council. In some instances it may also be necessary to apply for a new planning permit. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

TIPS

- Get clear instructions about what the purchaser thinks they are buying, and carefully check this is consistent with the plan of subdivision and contract of sale.
- Advise vendor clients about compliance with the SLA and consequences of breach.
- Check for amendments to the plan of subdivision.
- Advise purchaser clients about any non-compliance with the SLA by the vendor.
- Use good precedents and checklists to ensure all material issues are covered.
- Promptly inform clients of important dates and events.
- Address the insurance requirement if there is an owners corporation.
- Advise on sunset clauses.
- Advise developer clients on the expiry date of a planning permit.