

Off the plan: managing the risks

CLAIMS AGAINST CONVEYANCING PRACTITIONERS HIGHLIGHT PARTICULAR RISKS WHEN ACTING FOR VENDORS OR PURCHASERS IN OFF-THE-PLAN TRANSACTIONS. CLEAR INSTRUCTIONS ABOUT WHAT CLIENTS THINK THEY ARE BUYING ARE NEEDED BEFORE GIVING ADVICE. **BY MATTHEW ROSE**

Off-the-plan purchases are risky. They involve buying a property based on plans and artistic images without the benefit of a physical inspection.

The risks for purchasers include:

- delays in completion of construction
- insolvency of the developer during construction
- changes to the plan or advertised features
- the property losing value after the contract is signed, which often results in the purchaser being unable to obtain finance. This risk is amplified in a market of falling property prices.

The *Sale of Land Act 1962* (Vic) (SLA) contains specific protections for purchasers buying off the plan, including a right of rescission for certain breaches by the vendor. Therefore, a major risk for vendors is failing to comply with those SLA provisions.

When acting for purchasers or vendors, you need to remain alert to the particular risks of off-the-plan transactions and how a mistake could lead to serious consequences for your client and result in a negligence claim against you.

Acting for purchasers

There are specific issues that need to be dealt with in off-the-plan transactions and you need to have a comprehensive precedent letter of advice that explains them and a system to check that the letter is always tailored to the transaction at hand and sent.

Take detailed instructions from your client about what they think they are buying (eg, location, dimensions, finishes, car parks) and check whether



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- Knowledge of the pitfalls and good systems including checklists are essential when acting in off-the-plan transactions.
- Advise vendors on their obligations under the SLA, especially regarding sunset clauses and deposit money, and the consequences of non-compliance.
- Take instructions from purchasers about what they think they are buying and advise on changes to the property and vendor's non-compliance with the SLA.

the contract and plan of subdivision accord with these instructions. Check that the plans attached to the contract are legible. Advise your client about changes the vendor can make to the property before settlement and what your client's rights are under both the contract and SLA.

Advise your client on the meaning and effect of any sunset clause. Also advise them to seek an amendment to the sunset clause requiring the purchaser's consent before the vendor can terminate the contract. If there is no sunset clause tell the client about their rights under s9AE(2) to rescind if the plan of subdivision is not registered within 18 months of entry into the contract.

Be aware of foreshadowed legislative reforms by government¹ to better regulate sunset clauses in residential off-the-plan sales – requiring notices by vendors and consents by purchasers before rescissions based on a sunset clause.

Check the sunset date in the contract, put it in your diary and advise your client if the plan of subdivision is not registered in time. If a dispute about a sunset clause arises, seek the advice of experienced counsel early in the piece, as such disputes are usually complex and getting it wrong can be expensive.

Check that only a 10 per cent deposit has been taken and that it was paid to the vendor's lawyer, conveyancer or real estate agent. Tell your client that any breaches of the s9AA requirements will allow them to rescind under s9AE(1) any time before registration of the plan of subdivision.

Look for any material differences between the proposed plan of subdivision in the contract of sale and the plan finally registered. Examples include reduction in the lot size, change of boundary, removal of a car park and addition of an easement. Warn your client to also check the plan and inspect the property before settlement. Be alert to the possibility the vendor may have failed to notify your client about any amendments as required by s9AC(1). Advise your client on any potential right of rescission if the amendments materially affect the lot.

Warn your client that finance approval is often limited and/or conditional. It might be withdrawn months or even years later if property values fall in the intervening period before settlement, resulting in the proposed loan exceeding the lender's loan to value ratio. Also advise your client of the need to obtain finance by the stipulated time. Otherwise they may be unable to settle, entitling the vendor to rescind the contract, keep the deposit and resell the property – this risk is heightened in a rising market.

Warn your client not to pay money to the lender on the promise of a rebate of part of the purchase price at settlement or as a mezzanine loan to help finance the development. Advise your client if any such arrangement potentially breaches s9AA and explain the risks of advancing money to a vendor without adequate security.

Promptly tell your client when the occupancy permit is issued or plan of subdivision is registered. Failure to do so can leave your client insufficient time to procure finance or arrange a pre-settlement inspection.

Claims example – amendment to plan

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 them the plan could be amended, to check the measurements before settlement and engage a surveyor, 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 their right of rescission under s9AC(2).

Acting for vendors

When acting for vendors, it is often the simple things that go wrong. Deficient systems, including the lack of a good checklist, can result in basic mistakes with major consequences. For example, sunset date errors have resulted from a failure to obtain instructions or a simple typographical error with no system in place to check the date was entered correctly.

It is also important to give adequate advice and not make assumptions about your client's level of knowledge, even when they are experienced in off-the-plan transactions.

To manage your risk you need to do the following things:

Because multiple consultants are usually involved in any development, scope your role in writing and specify what advice you will not be providing. Recommend that your client obtains expert advice from other professionals such as surveyors, town planners, engineers and accountants as required.

Reiterate 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 to subdivide the land.

Ensure your precedent contract complies with the obligations imposed by the SLA, particularly s9AA, discussed below, and keep up to date with legislative changes.

Warn your client of the consequences of a breach of the SLA, including that the purchaser may rescind. Give specific advice about sections:

- s9AA and s9AE(1) regarding a 10 per cent deposit and how it is to be held, and

that failure to comply with s9AA gives the purchaser the right to rescind²

- s9AB requiring disclosure of certain works
- s9AC requiring that the purchaser be advised of proposed amendments to the plan of subdivision and the right to rescind if the changes are material
- s9AE(2) regarding the purchaser's right to rescind if the plan of subdivision is not registered within the sunset clause time frame or the statutory 18 months if there is no sunset clause.³

Check that the sunset date recorded in the contract is correct. Where the incorrect date is sooner than the vendor wanted, it may be difficult to have the plan of subdivision registered within that time.

Check with your client whether GST is to be payable on the purchase price and specify in the contract if GST is to be applied on the margin scheme.

Check whether the planning permit requires your client to enter into an agreement under s173 of the *Planning and Environment Act 1987* (Vic). If so, ensure the contract contains details of the restrictions required by the s173 agreement and advise the vendor on what they are required to do under the agreement before settlement.

Check to ensure you are transferring the correct lot on the plan of subdivision.

Conclusion

Off-the-plan transactions are higher risk than standard domestic conveyancing matters and need special treatment and focus. It is essential to be aware of the risks highlighted in this article, use well-drafted off-the-plan-specific documents and give clear advice that focuses on those risks. ■

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1. See Sale of Land Amendment Bill 2019 (Vic).
2. See *Everest Project Developments Pty Ltd v Mendoza & Ors* [2008] VSC 366 and LPLC bulletin Recent decisions affecting "off the plan" sales, <https://lplc.com.au/bulletins/recent-decisions-affecting-plan-sales/>
3. See *Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223, *Harofam Pty Ltd v Allen & Ors* [2013] VSCA 105 and *Harofam Pty Ltd v Scherman* [2013] VSCA 104.