

PURCHASERS' PROBLEMS WITH THE LOT

Practitioners acting for purchasers buying off-the-plan should beware.

Subdividing land, especially where the land is to be sold pursuant to a prescribed contract in accordance with the *Sale of Land Act* 1962 (Vic) (*SLA*) is fraught with risks, not only for the vendor and purchaser but also for their legal practitioners.

This article contains details of claims against practitioners when acting for purchasers off-the-plan and the lessons to be learned from those claims. Next month's column will look at claims when acting for the vendor in relation to subdivisions.

When acting for the purchaser, claims have arisen due to a failure by the practitioner to fully inform the client of matters such as:

- important dates;
- unusual special conditions; or
- rights to rescind the contract for material change to a plan of subdivision.

Important dates and unusual conditions

In one claim, the contract of sale contained two sunset dates which the purchaser could rely on. One of the special conditions was the usual "approval of subdivision" special condition setting out the vendor's obligations to register the plan and the right of either party to rescind should the plan not be registered within 24 months.

Another special condition was unusual in that it gave the purchaser a second right to rescind, to be exercised within seven days, in the event that the plan was not registered within 18 months.

The claim arose because the practitioner notified the purchaser of the two sunset dates only after the 18-month period had expired and the purchaser alleged he would have rescinded after 18 months if he had been told in time.

Lesson

Practitioners should inform their purchaser clients of any important dates, usually in the special conditions, and any rights they have to rescind in a timely manner so as to give the client sufficient time to consider their position and provide instructions.

Rescission for material amendment to the plan of subdivision

In another claim, a copy of the registered plan was enclosed with a letter from the vendor's practitioner to the purchaser's practitioner giving the purchaser notice that settlement was to take place in 14 days. The letter did not refer to the amendments to the plan. The practitioner acting for the purchaser failed to detect that the registered plan of subdivision was different to the one in the vendor's statement. The alterations to the plan included a new easement along one boundary and the enlargement of an existing easement on another boundary.

Had the client been told promptly they may well have been able to argue that the change materially affected the lot and been able to rescind the contract pursuant to s9AC of the *SLA*.

Cases to note

The question of what "materially affect the lot" means in section 9AC of the *SLA* has recently been considered in two cases: *Lockwood v PSP Investments Pty Ltd* [2013] VSC 10, and *Besser v Alma Homes Pty Ltd* [2012] VSC 460.

In the Lockwood case the vendor amended the plan at the request of the local council by changing all car parking lots to common property. Other amendments included deleting one lot and varying the footprint of two other lots. The purchaser in this case had entered into contracts to purchase four apartments and four car parking lots but as a result of the amended plans could only obtain title to the four apartments.

In the Besser case the voting rights listed on the plan of subdivision was altered to one out of 202 units of entitlement rather than the 100 out of 400 units of entitlement as per the proposed plan.

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Lesson

Practitioners acting for purchasers must:

- discuss with their client whether or not their retainer will include comparing the proposed plan with the one that is lodged for registration;
- read carefully the correspondence from the vendor's practitioner before and after the plan is registered;
- where necessary ask the vendor's practitioner what amendments have been made to the plan;
- provide to their client details of any amendments to the plan of subdivision provided by the vendor's practitioner;
- confirm in writing with the client who is responsible for comparing the proposed plan with the one that will be lodged for registration and/or registered; and
- inform the client of their rights pursuant to section 9AC of *SLA*.

In both cases the court concluded that the amendments materially affected the lots and the purchasers were entitled to rescind.

In both cases the court said that the test of materiality is an objective test on the facts and circumstances and does not necessarily have to have a detrimental or deleterious effect on the rights of the purchaser (see [18] and [27] of the Lockwood case).

Conclusion

When acting for purchasers buying land off-the-plan, it is essential that practitioners have an eye for detail, understand when changes are made to the plan of subdivision, and keep the client fully informed of time limits and changes to the plans. ●

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