

WHAT “SUBJECT TO FINANCE” REALLY MEANS

Purchasers who are bound to contracts they cannot complete because they have not obtained finance often look to blame their solicitors.

Allowing conditional contracts to become unconditional is the fifth-most costly cause of conveyancing claims.

Yet “subject to finance” clauses are now standardised in condition 14 of the current standard contract of real estate.

Condition 14

This condition can be used as a roadmap to identify various matters you need to discuss with your purchaser client, including:

- the specified date for approval of the loan;
- using best endeavours to obtain the loan; and
- the need to tell you when finance is approved or, if not, that the options are to arrange an extension, cancel the contract, or proceed unconditionally.

Clients should be informed of the consequences of each option and of the need to take positive steps if, having not obtained finance by the due date, they want to end the contract.

What goes wrong?

We see a few claims each year where purchasers are sure finance is available, having been told so by the broker, only to discover after the contract becomes unconditional that less or no finance is actually available.

Problems arise where clients arrange extensions directly with the vendor or the agent. While clients do this to save costs, the dangers of these informal arrangements include:

- undocumented extensions and problems of proof;
- documented arrangements that render contracts uncertain; and
- the failure to keep the solicitor advised of developments, resulting in time no longer being of the essence or the solicitor acting to the client’s detriment on a less-than-fully-informed basis.

In one recent claim, the vendor’s solicitor was exposed to liability because of undocumented extensions of the due date for

approval of finance. The finance clause had been extended six times and the contract was rendered uncertain by the haphazard manner in which these changes were acknowledged; at one point the contract was unconditional because the previous extended date had expired. The vendor subsequently claimed he had lost the benefit of an unconditional contract by a later agreement to further extend the approval date.

The option to end the contract provided by general condition 14.2 may only be exercised if the purchaser has applied for the loan immediately and done everything reasonably required to obtain approval of the loan. Clients fail to realise this obligation and make little or no attempt to arrange finance

no response is received or any follow-up by the purchaser’s solicitor is made before the time expires.

Avoiding those pitfalls

- Explain clearly to the client at the start of the retainer what the subject to finance clause means. This may require writing to the client immediately on receipt of the contract.
- Diary note the date on which the loan is to be approved and contact your client before the date to see whether it has been approved in writing.
- If finance has not been approved by the due date, obtain the client’s instructions as to whether they require an extension of time

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and then seek to avoid the contract when no finance is available by the due date.

Some clients take the subject to finance condition quite literally and assume that if finance is not approved the contract is void. This assumption is often maintained, even in the face of what the solicitor thought was a clear explanation to the contrary.

The client, acting under the wrong assumption, fails to alert their solicitor when finance is not approved by the due date and the solicitor assumes that finance has been approved because they have not heard anything to the contrary from the client.

In some instances, the solicitor does not make those assumptions but simply fails to diary note and follow up the client as the due date for approval of the loan approaches.

Even when a request for an extension of time for approval has been made within time,

within which to obtain finance, cancel the contract or proceed unconditionally.

- If the client requires an extension, the request should be made and an answer sought, diarised and followed up within the time provided by general condition 14.2 (c). Do not leave requests for an extension unanswered.
- If the client proposes ending the contract pursuant to general condition 14.2, the contract must be cancelled in clear and unequivocal terms. This subject has been previously canvassed by Russell Cocks in the December 2008 *LJ* (page 83) following the decision of Smith J in *Umbers v Kelson* [2008] VSC 348 (now on appeal). ●

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