



1



2

## Introduction

### Zoom poll

Since March 2020 how many breach of contract issues have you come across?

- 1 – 5
- 5 – 10
- 10 – 20
- 20 or more



3

## Introduction

You need to make a decision right now.

That decision is to improve how you deal with a breach of contract.

Do this by taking on board the risk management tips from this session.



4

## Quote

I find that the contract of sale is not void for uncertainty. Although a purchaser such as Mr La Rocca may be foolish to sign such a contract of sale, devoid of particularity as to the quality of construction, fixtures, fittings and finishes, this does not make the contract of sale void on the facts of this case.

*Mirvac (Docklands) Pty Ltd v La Rocca* [2006] VSC 48



5

## Key take-aways

- Recognise that a breach is outside the usual conveyancing process.
- Make sure clients are given timely advice about their options when dealing with a breach.
- Use a checklist to ensure important issues relating to the breach are dealt with.
- Knowing your limits means you know when to refer the client or brief a barrister.



6

## What we will cover today

### First half

- A breach has occurred – now what?
- Checklists
- Contract conditions

### 10 minute leg stretch

### Second half

- Relevant legislation
- Common law
- Know your limits

# AGENDA



7

## A breach has occurred – now what?

- Provide advice to the client
- Note rule 7 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015
  - advice must be clear and timely



8

## A breach has occurred, what now?

### Zoom Q&A - acting for vendor

List three matters you raise with your vendor client where the purchaser breaches the contract by failing to settle on the due date:

- 1.
- 2.
- 3.



9

## A breach has occurred, what now?

### Zoom Q&A - acting for purchaser

List three matters you raise with your purchaser client where the vendor breaches the contract as they cannot provide vacant possession:

- 1.
- 2.
- 3.



10

## A breach has occurred, what now?

### Zoom Q&A - acting for a nominee or guarantor

List three matters you raise with the nominee or guarantor where a purchaser breaches the contract by failing to settle on the due date:

- 1.
- 2.
- 3.



11

## A breach has occurred, what now?

Answer – use a checklist

'.....checklists are an essential tool for overcoming limitations with memory, and ensuring that action items are completed in sequence and without omission. The improper or non-use of checklists has been cited as a factor in some accidents.

Research has shown that this may occur for varying reasons and that experienced pilots are not immune to checklist errors. This accident highlights the critical importance of appropriately actioning and completing checklists....'.



12

## Key Risk Checklist



Advice for vendor when purchaser in breach

Key points:

- Know your contract
- Know what your vendor has done



13

## Key Risk Checklist



Advice for vendor when purchaser in breach

### **Zoom poll**

Does a vendor have to make a demand for payment of penalty interest?

- Yes
- No
- Don't know



14

## Key Risk Checklist



Advice for purchaser when vendor in breach

Key points:

- Limited compensation
- Default notice v rescission notice
- Ready, willing and able



15

## Key Risk Checklist



Advice for purchaser when vendor in breach

### **Zoom poll**

Can you tender when doing a settlement using PEXA?

- Yes
- No
- Maybe



16



## Contract conditions - LIV form, August 2019

General condition 26.1 - time of the essence

### Zoom poll

When will time no longer be of the essence?

- 14 days after the due date where no action taken to enforce the contract
- 30 days after the due date where no action taken to enforce the contract
- 60 days after the due date where no action taken to enforce the contract



17

## Foreseeable loss

### Zoom poll

Do you agree or disagree with the practice note:

- Agree
- Disagree

### Reasonable expenses

**The purchaser was five days late in settling. What expenses can the vendor claim pursuant to General Condition 25 of the 2018 Contract?**

In the absence of specific information included in the contract as to likely expenses facing the vendor in the event of default, the Property Law Dispute Resolution Committee has consistently taken the view that penalty interest payable as a result of the default is meant to be a reasonable pre-estimate of the damages suffered by the aggrieved party. On that basis, the Committee has rejected claims for:

- extra interest paid on bank bills;
  - extra interest paid on mortgage;
  - additional loan fee;
  - extra interest paid as a result of bank calculating interest monthly; and
  - additional interest paid to own vendor.
- The Committee rejected those claims on the basis that without the requisite information being in the contract they were not reasonably foreseeable costs at the time of entering into the contract.



18

## Penalty interest

Refer to general condition 33.

Interest at a rate of 2% per annum plus the rate for the time being fixed by section 2 of the Penalty Interest Rates Act 1983 is payable at settlement on any money owing under the contract during the period of default, without affecting any other rights of the offended party.

### Zoom poll

Do you calculate penalty interest on the adjusted price?

- Yes
- No



19

## Default notice

Refer to general condition 34.

A party is not entitled to exercise any rights arising from the other party's default, other than the right to receive interest and the right to sue for money owing, until the other party is given and fails to comply with a written default notice.

The default notice must:

- (a) specify the particulars of the default; and
- (b) state that it is the offended party's intention to exercise the rights arising from the default unless, within 14 days of the notice being given –
  - (i) the default is remedied; and
  - (ii) the reasonable costs incurred as a result of the default and any interest payable are paid.



20

## Default notice

### Zoom poll

How much do you charge for your legal costs on a default notice?

- \$440
- \$660
- \$880
- More than \$880



21

## Consequences of default

Refer to general condition 35.

35.1 - all unpaid money under the contract becomes immediately payable

35.2 - contract ends if default not remedied

35.3 and 35.4 - outcome depends on who issues the rescission notice

35.5 – certain rights survive



22

## Session break: 3 steps to recharge

### 1. Get your circulation going

- Stand up and stretch your arms way up high
- Try some jumping jacks
- Bend down and try to touch your toes

### 2. Reduce eye strain

- Look away from your computer and gaze at an object in the distance for at least 20 seconds
- Adjust your computer display settings – like brightness or contrast

### 3. Remember to stay hydrated

- Drink a big glass of water
- Have a refill ready for the next part of the session!



## Relevant legislation - Sale of Land Act 1962

- Section 9AC
- Section 9AE
- Section 10B
- Section 27(8)
- Section 29W
- Section 31(7)
- Section 32M
- Section 34



## Relevant legislation - Sale of Land Act 1962

### Section 11

A person cannot sell a lot affected by an owners corporation unless the vendor or the owners corporation has a current insurance policy in accordance with the Owners Corporations Act 2006.

Where a lot is sold in contravention the purchaser may avoid the sale at any time before the contract is completed.



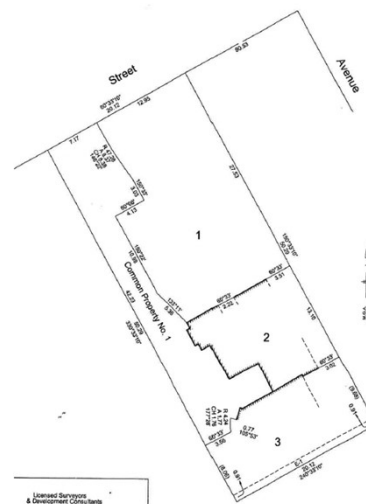
25

## Exercise - relevant legislation - Sale of Land Act 1962

### Background

You act for a vendor selling a lot on a plan of subdivision. There are 3 lots in total on the plan and all lots contain a dwelling. The lots share a driveway which is common property.

The vendor tells you each lot obtains their own insurance for building replacement.



26

## Exercise - relevant legislation - Sale of Land Act 1962

### Zoom poll

What advice would you give the vendor about owners corporations insurance?

- The current insurance complies with section 11.
- You must obtain public liability insurance in the name of the owners corporation to comply with section 11.
- You must obtain building replacement and public liability insurance in the name of the owners corporation to comply with section 11.



27

## Relevant legislation - Sale of Land Act 1962

Section 32K

### One relevant case

*McHutchison v Asli* [2017] VSC 258

36-38 Arundel Road, Park Orchards



28

## Exercise – section 32K Sale of Land Act 1962

**Background** - You act for a vendor selling their home. You ask the vendor if they have obtained any permits. The vendor instructs you that they have not obtained any building permits.

After exchange of contracts the purchaser discovers that the vendor obtained a planning permit issued by VCAT to develop the land.

No information about the VCAT orders or planning permit were included in the section 32 statement. The purchaser seeks to rescind.

The vendor says that you, the practitioner, are to blame for failing to ask the vendor whether they had obtained any planning permits.



29

## Exercise – section 32K Sale of Land Act 1962

‘.....the purchaser may not rescind a contract for the sale of land if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention....’

**Zoom poll** - has the vendor has acted honestly and reasonably?

- Yes
- No
- Not sure



30

## Relevant legislation - Building Act 1993 (Vic)

Section 137B sets out certain obligations of an owner builder when selling.

Note section 32B of the Sale of Land Act also contains a requirement in relation to owner builder insurance.

### Relevant case

*Fraser v Mason* (Building and Property)  
[2019] VCAT 1009



31

## Relevant legislation - Building Act 1993 (Vic)

### Zoom poll

Which of the following are owner builder works and caught by section 137B of the Building Act 1993?

- Owner paints their kitchen.
- Tradie builds a deck at the rear of a dwelling.
- Non structural works to remodel a bathroom completed more than two years ago.
- Removing a wall to combine a kitchen / diner.



32



## Common law

A common law right to terminate may arise, including in the following circumstances:

- breach of an essential term
- sufficiently serious breach of a non-essential term
- the repudiation of the contract by a party or
- fraudulent misrepresentation by a party.



33

## Common law

### Zoom poll

Is this an essential term of a contract?

The Vendor further agrees that it will provide the Purchaser with a deed of surrender or termination of lease that requires the current tenant at the Property as at the Day of Sale to vacate the Property not later than two (2) months after the Settlement Date. For the avoidance of doubt, the Vendor may terminate the lease at any time prior to the Settlement Date by deed or otherwise at the Vendor's discretion.

- Yes
- No



34

## Common law

### Repudiation

#### Relevant case

*McRae v Bolaro Pty Ltd* [2000] VSCA 72

### Fraudulent misrepresentation

#### Relevant case

*ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542



35

## Know your limits

When a breach occurs, it is important to recognise that this is not part of the usual conveyancing process.

At this point you need to determine whether the firm:

- has the expertise to deal with the breach
- can meet any deadlines
- has all the crucial information
- has the resources to do this matter well.



36

## Exercise - know your limits – briefing a barrister

### Background

You act for a purchaser who instructs you after exchange of the contract. You have discovered that the vendor failed to specify in the section 32 statement that the property was affected by a heritage overlay.

The purchaser client wants out. You inform the client that you need to brief a barrister to advise on the client's chances of success.



37

## Exercise - know your limits – briefing a barrister

### Zoom poll

How do you decide which barrister to brief?

- Ask around the office
- Brief the usual
- Call a barrister's clerk and ask for recommendations
- Look on Austlii for some recent cases about breach of section 32 and contact the barristers in the cases



38

### Key take-aways

- Recognise that a breach is outside the usual conveyancing process.
- Make sure clients are given timely advice about their options when dealing with a breach.
- Use a checklist to ensure important issues relating to the breach are dealt with.
- Knowing your limits means you know when to refer the client or brief a barrister.



39

## CONVEYANCING SERIES 2020 Mastering the essentials

Presented by Phil Nolan, Risk Manager, LPLC



40