

CONVEYANCING SERIES 2020

Mastering the essentials



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Breaches and risk management

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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. " [144]

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

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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.

Your comments

Introduction

Much has been written of the many ways a vendor or purchaser may bring the sale of land to a premature conclusion. There are also many cases which have considered the rescission of a contract of sale of land and many possible pieces of legislation which may apply both Federal and State. Given this, there can be no doubt that special attention is required by practitioners to deal with a breach of contract for the sale of land.

Purchasers sometimes allege a breach of section 32 of the *Sale of Land Act 1962* (Vic).

Experienced practitioners know that when acting for a vendor the most common allegation of breach is the purchaser's failure to settle on the due date. Sometimes because their lender is not able to advance funds.

What LPLC has seen in some claims is a failure to appreciate how complicated it can be dealing with a breach. Based on the LPLC claims data we suggest that to properly deal with any breach practitioners need to:

- Know exactly what the contract states about any breach.

The contract terms considered below are those contained in the LIV contract sale of land, dated August 2019.

Risk management tip

Read the contract and make a note of the relevant breach conditions. Even when you are looking at your own contract.

- Consider all relevant legislation.
For example, where a vendor has undertaken building works subject to a permit consider whether there is a breach of section 32E of the *Sale of Land Act*. It might also be necessary to consider a breach of section 137B of the *Building Act 1993* (Vic) for any owner builder works.
- Consider any relevant common law.
For example, breach of an essential term and rescission for a fraudulent misrepresentation.
- Know their limits to appreciate when it is necessary to refer a client or brief a barrister.

Accepting that a breach is not part of a usual conveyance leads to the realisation that a breach may end up in litigation. If you are in a firm which also does litigation, it is good risk management to seek guidance from a litigator on how to deal with the breach. Depending on your depth of experience dealing with breaches, consider whether a litigator is best placed to work with the client and brief counsel.

Taking this approach will give conveyancing practitioners the best chance to recognise the need to revisit any costs estimate or costs agreement and ensure the client is aware of any additional costs.

If you don't do litigation act quickly to transfer the client on to another firm who does litigation.

Your comments

Where to next?

The balance of this material considers various issues about breaches of contract when buying and selling land starting with suggestions on what information to give the client.



A breach has occurred, what now?

Exercise

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:

Acting for purchaser

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

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:

Further information about advising clients where there is a breach

Dealing with any breach includes providing enough advice to the client to enable them to make an informed decision.

Note rule 7 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 which imposes an obligation on practitioners to:

'...provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement....'

Practitioners must also:

'...inform the client... about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter....'

Keeping these requirements in focus will help practitioners assist both the practitioner and the client to deal with a breach.

Your comments

Tips on issues to raise with clients

Below are two checklists which contain information about the sort of issues that practitioners need to raise with clients to enable the clients to make an informed decision about any breach of a contract of sale of land.

Key Risk Checklist

Sale of land

Advice for vendor when purchaser in breach

Information about issues that practitioners need to raise with a vendor client to enable the client, when the purchaser is in breach, to make an informed decision.

Many of these issues are also relevant to advising a purchaser who has breached the contract.

Once issues like those listed below have been raised with the client, and the practitioner's suggested course of action is provided, the client is in a good position to provide the practitioner with their instructions.

No.	Item	Comments
1.	Contract of sale	Explain the relevant conditions in the contract dealing with the breach.
2.	Breach	<p>Give details of the breach.</p> <p>For example, the purchaser failed to pay the balance on the due date.</p> <p>It makes sense to also tell the client the actual amount due at settlement and provide practical suggestions, such as the need to re-organise any removalist.</p>
3.	Penalty interest	Give details of the penalty interest payable including rate and amount per day.
4.	Conduct of vendor	<p>Seek instructions from the vendor as to whether the vendor is ready, willing and able to settle.</p> <p>Seek instructions from the vendor as to whether the vendor has had any discussions directly with the selling agent, purchaser or purchaser's representative about the breach.</p> <p>These may not be known to the practitioner and it may be that the conduct of the vendor has resulted in time no longer being of the essence or</p>

		<p>the vendor may have waived their rights to take any action.</p> <p>Knowing this will impact on the advice which the practitioner will provide.</p>
5.	Without prejudice discussions	<p>Raise with the client that it may be appropriate for the practitioner to contact the legal representative for the other party on a without prejudice basis to discuss the breach.</p> <p>It may be that the other party is willing to pay an additional amount to avoid the costs of the default and/or to extend the settlement date and the vendor may accept this.</p>
6.	Default notice	<p>Ensure that the client understands the need to issue a default notice before they can exercise any rights arising from the breach.</p>
7.	Default notice v rescission notice	<p>Ensure that the client understands the difference between a default notice and a rescission notice.</p>
8.	Rescission notice	<p>Ensure that the vendor understands their rights and obligations if a rescission notice is served.</p> <p>For example, if the vendor validly rescinds the contract:</p> <ul style="list-style-type: none"> • the vendor is entitled to possession of the property • the vendor has a right to keep the deposit • that they are still liable to pay the estate agent's commission and expenses. Rarely does an agent's sales authority make payment subject to settlement. This is certainly not a standard term. • they are entitled to keep the property and sue for damages • they are entitled to resell the property and recover any deficiency in the price from the purchaser • the forfeited deposit is taken into account in calculating any damages.

		<p>Also ensure that the vendor understands that where a rescission notice is issued the purchaser's lender may withdraw their offer to provide the loan amount and this will mean settlement is unlikely to occur.</p> <p>This highlights the need to raise with the vendor the option of speaking with the purchaser's representative about the vendor's proposed course of action.</p>
9.	Costs	<p>Give the vendor an estimate of the costs of dealing with the breach and explain that they are primarily liable to pay these costs but that a proportion of them are usually recovered from the purchaser and paid when settlement occurs.</p> <p>It follows that the vendor needs to appreciate that if settlement does not take place the vendor will need to pay the practitioner's legal costs of dealing with the breach.</p>
10.	Enforcing the contract and issuing proceedings	<p>Ensure that the vendor is told about their right to take action to enforce the contract.</p> <p>An example of proceedings which may be issued is to remove a purchaser's caveat once the contract is rescinded.</p> <p>Inform the vendor as soon as a breach occurs if you are unable to act where there is litigation.</p> <p>There may be several reasons for this including lack of experience or time constraints.</p> <p>A vendor may be distressed if they find out at a later stage that the firm is unable to assist.</p>
11.	Insolvent purchaser	<p>Ensure the vendor understands that sometimes a purchaser and any guarantor under the contract may be insolvent which will impact on the prospect of recovering any damages in addition to the deposit.</p>
12.	Briefing a barrister	<p>Seek instructions before briefing a barrister and consider the need to obtain funds up front from the client to cover the barrister's costs.</p> <p>Refer to the LPLC practice risk guide Commercial</p>

		<p>litigation – staying alert for risk management tips on briefing a barrister including:</p> <ul style="list-style-type: none"> • Brief competent counsel with full briefs. • Communicate effectively with counsel so all relevant issues are canvassed, and deadlines are met.
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Breach by purchaser – advising a vendor

Exercise

Background

Refer to the LPLC checklist - Breach by purchaser – advising a vendor.

Action

Discuss any suggested amendments and possible additions to the checklist.

Sale of land

Advice for purchaser when vendor in breach

Information about issues that practitioners need to raise with a purchaser client to enable the client, when a vendor is in breach, to make an informed decision. Many of these issues are also relevant to advising a vendor who has breached the contract. Once issues like those listed below have been raised with the client, and the practitioner's suggested course of action is provided, the client is in a good position to provide the practitioner with their instructions.

No.	Item	Comments
1.	Contract of sale	Explain the relevant conditions in the contract dealing with the breach.
2.	Breach	Give details of the breach. For example, the vendor failed to provide vacant possession.
3.	Penalty interest	Tell the purchaser they cannot claim any penalty interest.
4.	Loss	Tell the purchaser they may claim reasonably foreseeable expenses such as additional rent but must mitigate their loss. According to the LIV practice note this means any interest that would have been paid on a loan to fund the purchase needs to be offset against any loss. '...The practical result is that the purchaser will rarely have a claim...'
5.	Default notice	Ensure the client understands the need to issue a default notice before they can exercise any rights arising from the breach.
6.	Rescission notice	Ensure the client understands the difference between a default notice and a rescission notice. Ensure the client understands the effect of a rescission

		<p>notice.</p> <p>For example, if a rescission notice is served, the contract is at an end once the 14 days have passed, if the default is not remedied.</p>
7.	Costs	<p>Ensure the client is given an estimate of the costs of dealing with the breach and told that they are primarily liable to pay these costs and that they are usually adjusted at settlement against the vendor.</p>
8.	Damaged goods	<p>If the breach is that goods included in the sale are damaged, the purchaser needs to understand their rights and obligations pursuant to general condition 31 (previously general condition 24) of the Law Institute contract of sale of land, August 2019.</p> <p>General condition 24 was considered in: Patmore & Anor v Hamilton [2014] VSC 275</p> <p>In this case Justice Digby explained how general conditions 24.4 worked.</p> <p><i>45. Pursuant to General Condition 24.4, the purchaser may nominate an amount not exceeding \$5,000 to be held by the stakeholder. Clause 24.4 does not reflect an agreed intention that the nominated sum proposed to be withheld is the subject of any limitation beyond the agreed cap of \$5,000, although its nomination under Clause 24.4 must relate to the purchaser asserting that the property is not in the condition required by general condition 24.2 at settlement.</i></p> <p><i>46. Clause 24.4 requires no justification or substantiation of the amount nominated by the purchaser. The purchaser may nominate, in my view, any sum up to \$5,000 without substantiating the sum withheld. The fixing of a modest amount by way of an agreed cap is, it would appear, the only intended prescription applying to the sum of the amount to be withheld.</i></p>

		<p>Risk management tip</p> <p>Before agreeing on holding funds back at settlement ensure the terms of the retention of funds include an agreed mechanism for releasing the funds.</p>
9.	Tender	<p>Explain to the purchaser, about the need to tender the balance due at settlement or obtain agreement of the vendor that there is no need to tender. Doing either will mean that the vendor has no right to claim penalty interest.</p>
10.	Conduct of purchaser	<p>Seek instructions from the purchaser as to whether the purchaser is ready, willing and able to settle.</p>

Breach by vendor – advising a purchaser

Question

How do you tender when doing a settlement using PEXA?

Your comments

Contract conditions - LIV form, August 2019

The following is a list of conditions relevant to a breach of contract from the Law Institute of Victoria contract of sale of land copyright August 2019.

Time is of the essence

Refer to general condition 26.1

Time is of the essence of this contract.

This means the parties to the contract are on notice that they must fulfil their contractual obligations by the date specified in the contract, importantly, to pay the balance due on the due date for settlement.

Either party may waive the benefit of the provision that time is of the essence. Where there is a breach of the contract, it is important to determine that time has remained of the essence before exercising the right to rescind.

Where time is no longer of the essence, the failure to reinstate time may render the rescission void.

Question

When will time no longer be of the essence?

Your comments

Risk management comments

Each case needs to be considered on its facts.

The starting point is to determine whether the contract has a condition stating that time is of the essence. Most contracts in Victoria include a condition which makes time of the essence – i.e. it is an essential term of the contract that conditions as to time be strictly complied with.

Where time is no longer of the essence, an offended party must make time of the essence by giving notice of a reasonable period within which to complete so that the other party can, at that time, be said to be in default and so the innocent party can rescind. Only once time is again of the essence can a rescission notice be served. Usually the contract requires service of a notice of rescission specifying the contractual period within which the default must be remedied after which the contract is at an end.

Relevant cases

Portbury Development Co. Pty Ltd v Ottedin Investments Pty Ltd [2014] VSC 57 is an example of a case where time remained of the essence. There was an agreement to extend the settlement date combined with a condition in the contract stating that time is of the essence and the vendor had not waived that condition.

Qin v Smith (No. 2) [2013] VSC 476 is an example of a case in which it was held that time had ceased to be of the essence – a vendor's notice of default was held to be ineffective in that case because the vendor had not been ready willing or able to settle on the specified contract date. The vendor had to first make time of the essence again before serving a notice of rescission on the purchaser.

Breach

Refer to general condition 32.

A party who breaches this contract must pay to the other party on demand:

- (a) compensation for any reasonably foreseeable loss to the other party resulting from the breach; and
- (b) any interest due under this contract as a result of the breach.

Foreseeable loss

Exercise

Provide three examples of what might be a reasonably foreseeable loss for a vendor.

Further information

The Law Institute of Victoria has issued the following practice note:

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 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.

You can find this practice note, along with 50 others in the conveyancing tab in the LIV diary.

Your comments

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.

Question

Do you calculate penalty interest on the adjusted price?

Your comments

Notes

A starting point is to define 'money owing' in general condition 33.

Condition 4 of Table A of the *Transfer of Land Act 1958* (Vic) referred to penalty interest payable on the 'money overdue'.

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.

Question

What is the difference between a default notice and a rescission notice?

Your comments

Risk management comments

A default notice specifies the particulars of the default and gives the offending party 14 days to remedy the default.

A default notice does not need to specify the consequences if the default is not remedied to satisfy any obligation to give notice of the default.

A rescission notice by comparison is a default notice which states that unless the default is remedied, reasonable costs are paid and interest is paid within the time specified, the contract is at an end.

Warnings

Before serving a default or rescission notice practitioners need to obtain their client's clear instructions as to what outcome the client is trying to achieve. We have seen claims where the practitioner served a rescission notice which had the effect of ending the contract when the client did not wish to end the contract.

Also, double check the content of the rescission notice to make sure all the required information is included. Imagine the person receiving the notice has not been involved in the transaction.

Your comments

Relevant case

For an example of the way rescission notices can be challenged and considered by the court see *Damco Nominees Pty Ltd v Moxham* [2012] VSC 79.

In this case the vendor's lawyer issued a rescission notice the day after the appointed day for settlement when the purchaser failed to settle. A month later the purchaser said the rescission notice was defective and that they had funds to settle and lodged a 'purchaser's caveat'.

The vendor made application to have the caveat removed under s. 90(3) of the Transfer of Land Act.

The Court determined that the rescission notice was not defective, holding that the defendant did not have a prima facie basis to sustain the caveat on the asserted ground that the notice was defective.

Your comments

Consequences where the default is not remedied

Refer to general condition 35.

35.1 All unpaid money under the contract becomes immediately payable to the vendor if the default has been made by the purchaser and is not remedied and the costs and interest are not paid.

Comments

The wording of general condition 35.1 is based on the wording from condition 6(1) of Table A of the seventh schedule of the Transfer of Land Act 1958 (Vic).

Where the default has been made by the purchaser and is not remedied all monies unpaid under this contract shall become immediately payable and recoverable at the option of the vendor.

Refer to general condition 35.2.

The contract immediately ends if:

- (a) the default notice also states that unless the default is remedied and the reasonable costs and interest are paid, the contract will be ended in accordance with this general condition; and
- (b) the default is not remedied, and the reasonable costs and interest are not paid by the end of the period of the default notice.

Your comments

Purchaser issues default notice

Refer general condition 35.3.

If the contract ends by a default notice given by the purchaser:

- (a) the purchaser must be repaid any money paid under the contract and be paid any interest and reasonable costs payable under the contract; and
- (b) all those amounts are a charge on the land until payment; and
- (c) the purchaser may also recover any loss otherwise recoverable.

Your comments

Vendor issues default notice

Refer general condition 35.4.

If the contract ends by a default notice given by the vendor:

- (a) the deposit up to 10% of the price is forfeited to the vendor as the vendor's absolute property, whether the deposit has been paid or not; and
- (b) the vendor is entitled to possession of the property; and
- (c) in addition to any other remedy, the vendor may within one year of the contract ending either:
 - (i) retain the property and sue for damages for breach of contract; or
 - (ii) resell the property in any manner and recover any deficiency in the price on the resale and any resulting expenses by way of liquidated damages; and
- (d) the vendor may retain any part of the price paid until the vendor's damages have been determined and may apply that money towards those damages; and
- (e) any determination of the vendor's damages must take into account the amount forfeited to the vendor.

Your comments

Rights survive

See general condition 35.5.

The ending of the contract does not affect the rights of the offended party because of the default.

Your comments

Relevant legislation

Sale of Land Act 1962

There are numerous breaches of the Sale of Land Act which trigger a purchaser's right to rescind.

This paper considers section 11 and section 32K and the following is a list only of the other sections:

Section 9AC material amendments to proposed plan of subdivision.

Section 9AE payment of deposit, disclosure of works, plan not registered within period specified in the contract or 18 months if none specified.

Section 10B statutory sunset clause process before rescission by vendor can be effective.

Section 27(8) purchaser's right to rescind where a vendor knowingly or recklessly supplies false information to the purchaser regarding any release of deposit particulars.

Section 29W purchaser's right to rescind where legal representative acts for vendor and purchaser in a terms contract.

Section 31(7) purchaser's right to rescind where no cooling-off notice given.

Section 32M purchaser's right to rescind where after the day of sale but prior to settlement a notice of intention to acquire has been served under section 6 of the *Land Acquisition and Compensation Act 1986* (Vic) in respect of the land.

Section 34 power of purchaser to rescind where house destroyed.

Your comments

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.

Exercise**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.

Question

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

Your comments

Section 32K

Much has been written about rescission pursuant to section 32 of the Sale of Land Act.

Prior to October 2014 amendments to the Sale of Land Act, the right to rescind was contained in section 32(5) and 32(7).

Relevant case - *McHutchison v Asli* [2017] VSC 258

Background

The section 32 statement provided that sewerage was connected to the property. There was no 'town' sewer. The property was serviced by a septic tank.

A permit for use of the septic tank which contained conditions of use was not disclosed as required by section 32D. The estimated cost to comply with the permit was about \$400 per annum.

In accordance with section 32K the purchaser rescinded the contract for the breaches of section 32.

Decision

Justice Digby was not convinced the vendor acted honestly and reasonably and ought to be excused. In any event the purchaser was not in substantially as good a position. Orders were made for the return of the deposit and the vendor to pay the purchaser's legal costs.

Your comments

Breach of section 32

Exercise

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.

Section 32K of the Sale of Land Act relevantly provides that:

'.....the purchaser may not rescind a contract for the sale of land if the court is satisfied that

- (a) the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention....'*

Question

Has the vendor has acted honestly and reasonably?

Your comments

Relevant case

Downing v Lau [2018] VCC 33

Article

Honest and reasonable by Russell Cocks, LIJ May 2018.

Building Act 1993 (Vic)

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

A purchaser may avoid a contract of sale of land where a vendor who is an owner builder:

- fails to provide the purchaser, before the purchaser enters into the contract, with an owner builder inspection report from a prescribed building practitioner less than 6 months old
- is not covered by the required owner builder insurance and does not give the purchaser a certificate evidencing the existence of that insurance
- fails to include the owner builder warranties as contained in section 137C in the contract of sale.

Notes

Section 32B of the Sale of Land Act also contains a requirement in relation to owner builder insurance. This section relevantly provides that:

A section 32 statement must contain the following insurance details in respect of the land —

- (b) *if there is a residence on the land which was constructed within the preceding 6 years and section 137B of the Building Act 1993 applies to the residence, particulars of any required insurance under that Act applying to that residence.*

The warranties are contained in the standard LIV form of contract of sale. Refer to general condition 6.6:

If sections 137B and 137C of the Building Act 1993 apply to this contract, the vendor warrants that:

- (a) *all domestic building work carried out in relation to the construction by or on behalf of the vendor of the home was carried out in a proper and workmanlike manner; and*
- (b) *all materials used in that domestic building work were good and suitable for the purpose for which they were used and that, unless otherwise stated in the contract, those materials were new; and*
- (c) *domestic building work was carried out in accordance with all laws and legal requirements, including, without limiting the generality of this warranty, the Building Act 1993 and regulations made under the Building Act 1993.*

Example of a claim

A practitioner received instructions to prepare auction contracts and a section 32 statement for the sale of a residence. The practitioner knew a garage had been constructed by a registered builder but did not consider the status of a further addition of an extra room carried out by the vendor as domestic owner builder for \$45,000.

The section 32 statement prepared by the practitioner included a property information certificate from the local council listing both building permits.

However, the section 32 statement did not include a condition report or a certificate of insurance in respect of the further addition and the contract did not include the warranties. The purchaser avoided the contract and the vendor incurred significant losses as soon after there was a significant drop in the market and a much lower price was obtained.

Comments on the claim

A condition report which is no more than six months old at the time of contract prepared by a prescribed building practitioner such as an architect, building surveyor or building inspector must be given to the buyer pre-contract. Although it is common practice to attach an owner builder inspection report to a section 32 statement there is no legal requirement to do so.

Question

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.

Relevant case

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

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.

Breach of a term

To be able to advise a client on their rights when a condition in the contract has been breached it is important to understand whether the condition relevant to the breach is an essential term or a sufficiently serious breach of a non-essential term.

Question

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.

Your comments

Relevant case

Aurumstone Pty Ltd v Yarra Bank Developments Pty Ltd [2017] VSC 503

In this case the Victorian Supreme Court determined that a condition enuring includes an essential condition and the court analysed the classification of conditions.

The following is an excellent summary of the usual classification of conditions from this case:

- (a) *A contingent condition merely provides that the formation of a contract, or its performance, is subject to a contingency; [29] but does not include a promise by a party (and does not create an obligation on a party). A typical example is a condition providing that a contract is subject to purchasers completing the sale of their*

property, such as was considered in *Perri v Coolangatta Investments Pty Ltd*.^[30] Brennan J described the clause as a stipulation which 'specifies the event upon the occurrence of which the obligations to complete cease to be contingent, [but] the stipulation contains no promise that the event will occur'.^[31]

- (b) Contingent conditions are therefore to be distinguished from promissory terms.^[32] Traditionally, promissory terms were categorised as either conditions (breaches of which give rise to a right to terminate) or warranties (breaches of which only give rise to a claim for damages).^[33] However, at least since the High Court decision in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,^[34] it has been recognised in Australia that there are three categories of promissory terms:

- (i) An essential term where the parties demonstrate an intention that the condition is essential and any breach by a party will entitle the other party to terminate the contract and claim for damages. As was said by the majority in *Koompahtoo*:

It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and ... the commercial purpose it serves, that determines whether a term is 'essential', so that any breach will justify termination.^[35]

An essential term was 'sometimes described as a condition'.^[36]

- (ii) An intermediate (or innominate) term gives rise to a non-essential obligation; but the breach of such a term may be sufficiently serious to justify termination.^[37] A breach of such a term will be sufficiently serious if it goes to the root of the contract^[38] and is 'such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract'.^[39]
- (iii) A warranty, which is a non-essential term, giving rise to a claim for damages, but no right to terminate for breach. [41]

Your comments

Repudiation

Repudiation occurs where there is a clear demonstration by one party that they do not intend to be bound by the contract. What the courts require is a high level of disregard for a contract.

It is only upon acceptance of a repudiation that the contract comes to an end.

This is a complicated area of law and the best risk management advice is to brief an experienced property law barrister to advise on issues such as whether conduct constitutes a repudiation and the advantages and disadvantages of accepting a repudiation.

For a case in Victoria which highlights how complicated such matters can be see *McRae v Bolaro Pty Ltd* [2000] VSCA 72.

Your comments

Fraudulent misrepresentation

At common law a party may also rescind a contract based on fraudulent misrepresentation and claim damages. The right arises where the false statement causes or induces the misled party to enter into a contract.

Upon discovery of the false statement a misled party looking to rescind should give notice of rescission without delay. The rescission is effective once notice is given.

There is no prescribed form of notice so a letter particularising the basis of the rescission and stating that the misled party rescinds the contract would usually be sufficient.

In *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542 the plaintiff sought to end the contract on the grounds of LPD's fraudulent misrepresentation that the development land had not previously been sold.

More commonly fraudulent misrepresentation is alleged by an insurer seeking to deny liability. In *Montclare v Metlife Insurance Ltd* [2015] VSC 306 the insured fraudulently represented to the insurer that they had not been refused insurance. In *Kalabakas v Chubb Insurance Company of Australia Ltd* [2015] VSC 705 the failure by the insured to disclose four matters to the insurer about defective building works, including that there was no occupancy permit for the dwelling was a fraudulent misrepresentation.

Your comments

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:

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

At LPLC we call this part of the engagement decision.

You can find a lot about the engagement decision on our website including our engagement decision tool.

Also refer to the LPLC article in the March 2020 edition of the LIJ titled 'Choose your litigation clients carefully'.

Briefing a barrister

Exercise

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.

Question

How do you decide which barrister to brief?

Your comments

Other issues worth considering

Reserving rights prior to settlement and taking action after settlement

See *Silvanna Pty Ltd v Screecree Pty Ltd (Civil Claims)* [2016] VCAT 678

Conduct of purchaser

See *Tymstock Pty Ltd v Patrick* [2019] VCC 1092

Your comments

Appendices index

- 1 Default notice
- 2 Rescission notice

Appendix 1 - Default notice

To: The Purchaser / Vendor *and* **To:** The Practitioner for the Purchaser / Vendor

Schedule

1. Vendor:
2. Purchaser:
3. Date of contract:
4. Land description:
5. Property address:
6. Due date:
7. Particulars of default (*):
8. Interest rate:
9. Legal costs (**):

Take note that you are in default under the contract referred to in the Schedule and that the particulars of default are specified in Item 7 of the Schedule.

Take further notice that the vendor/purchaser intends to exercise his/her/its rights unless:

- the default is remedied within 14 days of the service of this notice upon you; and
- the proper legal costs specified in Item 9 and interest on the amount due under the contract at the interest rate specified in Item 8 are all paid within 14 days of service of this notice upon you.

Dated the day of 20
.....

Practitioner for the Vendor/Purchaser

(*) **Suggested wording where purchaser fails to pay residue:**

‘The Purchaser/s has/have defaulted in the performance of the Purchaser’s/s’ obligations under the contract by failing to pay to the Vendor the residue of purchase money and adjusted apportionable outgoings on the due date or at all.’

(**) a specific amount must be included here so the defaulting party knows exactly what has to be paid to rectify the default.

Appendix 2 - Rescission Notice

To: The Purchaser / Vendor *and* **To:** The Practitioner for the Purchaser / Vendor

Schedule

1. Vendor:
2. Purchaser:
3. Date of contract:
4. Land description:
5. Property address:
6. Due date:
7. Particulars of default (*):
8. Interest rate:
9. Legal costs (**):

Take note that you are in default under the contract referred to in the Schedule and that the particulars of default are specified in Item 7 of the Schedule.

Take further notice that the vendor/purchaser intends to exercise his/her/its rights unless:

- the default is remedied within 14 days of the service of this notice upon you; and
- the proper legal costs specified in Item 9 and interest on the amount due under the contract at the rate specified in Item 8 are all paid within 14 days of service of this notice upon you.

And take further notice that unless the default is remedied and the legal costs and interest paid in accordance with this Notice the contract will be rescinded pursuant to [general condition 35.2 of the contract]

Use this phrase if the contract is the August 2019 standard form of contract issued by the Law Institute of Victoria otherwise insert the relevant clause.

Dated the day of 20

.....

Practitioner for the Vendor/Purchaser

(*) Suggested wording where purchaser fails to pay residue:

‘The Purchaser/s has/have defaulted in the performance of the Purchaser’s/s’ obligations under the contract by failing to pay to the Vendor the residue of purchase money and adjusted apportionable outgoings on the due date or at all.’

()** A specific amount must be included here so the defaulting party knows exactly what has to be paid to rectify the default.