CONVEYANCING SERIES 2022

Mastering the essentials

LPLC LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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Conveyancing and three key issues

Release of deposit, owner-builders and owners corporations

Contact information

Phil Nolan | Risk Manager, LPLC

Please contact me with any risk management issues

T: 03 9672 3800 E: phil.nolan@lplc.com.au

Website / social media

lplc.com.au

 @LPLC_AU

 @LPLCAU

 Linkedin.com/company/lplc

Quote

There are three schoolmasters for everybody who will employ them – the senses, intelligent companions and books. Henry Ward Beecher

CPD information

1.0 CPD Practice Management

0.5 CPD Substantive law

For all queries relating to CPD rules please refer to the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*. Information can also be found here. LPLC does not keep records of practitioner CPD.

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Three key points

- There are many issues to consider about the release of a deposit
- Owner-builder requirements can be complicated
- Consider all options when dealing with owners corporations issues

Introduction

Three areas in conveyancing matters come up regularly in enquiries to LPLC:

1. Disputes about release of deposits
2. Obligations imposed on owner-builders
3. Owners corporations issues

Some of these enquiries are dealt with by reference to the relevant legislation and cases. These are like the books in the quote by Henry Beecher.

Other enquiries are resolved by common sense. Perhaps this is one of the senses Henry Beecher was referring to.

And a few enquiries result in a recommendation to brief a barrister to advise as there is no easy answer. Surely barristers would qualify as some of the intelligent companions that Henry Beecher was referring to.

The failure to properly deal with any of these issues may have serious consequences for a client, may mean that a client has committed an offence and may result in your fixed fee for the conveyancing to be well exceeded.

Clients need to understand that:

- There are some unknowns in relation to these issues. For example, how to calculate the 'value' of owner-builder works for insurance purposes.
- Some issues are complicated and may require a consideration of legislation and relevant cases. For example, which conditions in a contract of sale enure for the benefit of the purchaser.
- It may be necessary to engage an expert to provide an opinion.
- A dispute about these issues may end up in court. For example, see the case of *McEwen v Theologedis* [2004] VSC 244. The vendor in this case successfully argued that the objections made by the purchaser to the release of deposit were unreasonable. The purchaser was ordered to pay the vendor's costs.

Your comments

Release of deposit

Poll

Is a purchaser entitled to rescind a contract where the information in the section 27 statement is false?

Yes

No

Don't know

Introduction

Section 27 of the *Sale of Land Act 1962* (Vic) provides for the circumstances where a purchaser may authorise the stakeholder to release the deposit moneys prior to settlement. This process is unique to Victoria. In all other jurisdictions the release of deposit for the sale of land takes place at settlement.

Compliance is sometimes not straight forward as the section is complicated and contains numerous conditions which must be satisfied.

To make matters even more complicated there are a number of cases which need to be considered to enable a practitioner to give advice about the release of deposit.

Issues raised with LPLC

Let's now consider some of the issues about the release of deposit which have been raised with LPLC.

- **Acceptance of title**

One issue raised is when 'acceptance of title' occurs given that a release can only happen where the purchaser has accepted title or is deemed to have accepted title.

General condition 14.6 in the Law Institute of Victoria standard contract of sale of land deems acceptance of title to occur if the purchaser is deemed by section 27(7) of the Sale of Land Act to have given the deposit release authorisation referred to in section 27(1)

Not all contracts follow the LIV standard contract of sale so it is important to always read the contract carefully to see if there is an acceptance of title provision.

- **Conditions enuring for the benefit**

One contentious issue raised with LPLC is the meaning of conditions enuring to the purchaser's benefit.

One view is that there are very few conditions enuring for the purchaser's benefit. Examples would include a subject to finance condition or building inspection condition.

A broader view is that the standard contract contains many conditions that enure for the benefit of the purchaser. For instance, the obligation to deliver the property

at settlement in the condition it was sold. Interpreted this way, may mean that the deposit could never be released until settlement.

This issue was considered in the case of *Aurumstone Pty Ltd v Yarra Bank Developments Pty Ltd* [2017] VSC 503.

The court determined that an essential term of a contract is a condition enuring for the benefit of the purchaser.

One alternative argument put to the court was that a condition enuring means a contingent condition, also known as a 'condition subsequent' or a 'condition precedent to performance' which remains to be fulfilled.

Some have taken the view that this case changes the landscape on release of deposits and that the scope for a vendor to require the release of the deposit is more limited.

Others go even further and believe that it will be rare for a deposit to be released given the judgement.

□ Grounds to object

Another issue raised with LPLC is what is a valid ground for objecting to the release of a deposit.

Practitioners are referred to the case of *McEwen v Theologedis* [2004] VSC 244.

Poll

Which of the following is a valid ground to object to the release of the 10% deposit?

- The vendor may default on their mortgage.
- Outstanding rates.
- Property may be damaged prior to settlement.
- Loan discharge amount exceeds 90% of the sale price.

One key take away from McEwen's case seems to be that where a vendor believes that the objections by the purchaser are not valid their only course of action is to seek a court order for the release.

Also note the comments in McEwen's case at paragraph 21:

> I accept the vendor's submission that, on the proper construction of section 27, the purchasers' reasons must reflect the matters set out in sub-section (4). That is to say, the purchasers may only have regard to the accuracy of the particulars and the sufficiency of the purchase price to discharge all mortgages over the property. A purchaser may not refuse to authorize the release of the deposit on any other ground.

□ Consequences for breach of section 27

This leads to another issue raised by practitioners namely, what are the consequences where a deposit is released in breach of section 27?

The answer lies in section 16 of the Sale of Land Act which states that it is an

offence to sell land in contravention of the provisions of this Act. You may need to refer to this section where you believe there are issues preventing the valid release of the deposit.

There may also be allegations that money was released by a stakeholder without authority or that money was released from a trust account in breach of the Uniform Law. Note section 138 which provides that:

> A law practice must:
>
> (a) hold trust money deposited in the law practice's general trust account exclusively for the person on whose behalf it is received; and
>
> (b) disburse the trust money only in accordance with a direction given by the person.

□ **False information in section 27 statement**

Some practitioners who contact LPLC are looking for guidance on a purchaser's rights where they discover that the section 27 statement contains information that is incorrect or where the statement is incomplete.

Section 27(8) of the Sale of Land Act provides that where the vendor knowingly or recklessly supplies false information to the purchaser regarding the required particulars about any mortgages or caveats, then the purchaser may rescind the contract. Note that the vendor has to knowingly or recklessly do this.

Questions have also been raised with LPLC about the validity of a condition in a contract which may breach the requirements in section 27.

Section 28 of the Sale of Land Act provides that where a contract contains provisions in contravention of division 3, which includes section 27, those provisions are void and of no effect and the contract is voidable by the purchaser at any time before completion and any person who has paid money under the contract is entitled to recover it.

Section 28 does however give a vendor the opportunity to enforce the contract where they can convince the court that they have acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if all the relevant provisions of this Division had been complied with.

Further information

If you are looking for more information, then fortunately much has been written about the release of deposit. For example:

- Pull to release by Russell Cocks December 2009 83(12) LIJ p.73
- Don't pay up to soon by Russell Cocks November 2011 85(11) LIJ p.78
- Safe Deposits by William Rimmer 2013 87(10) LIJ p.46
- Sale of Land Victoria by David Lloyd and William Rimmer 2015 Thomson Reuters

Release of deposit – do the right thing

Ethical issues may arise in relation to the release of deposit and there can be serious consequences where a deposit is dealt with contrary to the Sale of Land Act.

Please contact LIV ethics if you have any ethical issues about holding or releasing a deposit.

T: 9607 9336

E: ethics@liv.asn.au

Exercise

You act for a developer selling apartments off-the-plan. The developer is struggling to fund the final stage of the development. Prior to registration of the plan the selling agent convinces a number of purchasers to agree to the early release of the deposit to help out the vendor.

Question

Can the deposit be released to the developer?

Yes

No

Don't know

Your comments

Owner-builders

Poll

Background

Your vendor client has undertaken the following owner-builder works:

- Renovated laundry - $12,000 – 2 years ago
- Renovated bathroom - $13,000 - recently

Question

Is the vendor required to obtain owner-builder insurance as the value of the works exceed $16,000?

Yes

No

Don't know

Introduction

The owner-builder provisions in the *Building Act 1993* (Vic) impose numerous obligations on owner-builders. The main requirements are contained in section 137B and provide that a person who constructs a building must not enter into a contract to sell the building within the prescribed period unless:

- if they are not a registered builder – they have obtained a building report which is less than six months old and given it to the intending purchaser;
- they are covered by any required insurance and have given the intending purchaser a copy of the insurance certificate; and
- where the building is a home, the contract contains the required warranties. Happily, the warranties are contained in the standard LIV contract of sale of land. General condition 6.6 of the August 2019 copyright version. If you don't use the LIV contract, do you have the warranties in your precedent?

One of the difficulties with these provisions is determining what 'construct a building' means. Construct is defined in sub-s137B(7) to include:

- build, rebuild, erect or re-erect the building;
- make alterations to, enlarge or extend the building; and
- cause any other person to do these things or manage or arrange the doing of these things.

Building is defined in s3 of the Building Act and includes structure, temporary building, temporary structure and any part of a building or structure.

It seems that 'construct a building' includes building new homes, garages, sheds and verandahs, as well as extensions to homes, garages and sheds, including verandahs and decks. But what is meant by 'make alterations' to a building (or any part of the building) is not clear.

For the purposes of the Act, would a building be altered by installing a new kitchen, bathroom or an air-conditioner in the wall or by enclosing the verandah with fly screens, moving an internal door or painting the walls?

Not only are the provisions difficult to understand and interpret, but compliance can sometimes be difficult and other times impossible.

The biggest issue is that failing to comply with them may mean that the purchaser has the right to avoid the contract at any time up until settlement. This is what we call a 'drop dead' provision as there is no way to stop the purchaser avoiding the contract if the vendor hasn't complied with the provisions before the contract was signed.

This is probably why the *Domestic Building Contracts Act 1995* (Vic) (DBC Act) gives a vendor the right to apply to VCAT to be exempt from the owner-builder obligations. Refer s.68.

Issues raised with LPLC

LPLC receives enquiries regularly about these provisions. The following are examples of common questions.

- **Is there a definition of owner-builder works?**

Owner-builder works are not defined in the Building Act or the DBC Act.

Section 137B of the Building Act effectively defines owner builder works by excluding what they aren't. That is they are any building works except:

- building works constructed by a registered builder, architect or endorsed building engineer – but his doesn't include a home
- homes constructed under a major domestic building contract
- a building exempt by VCAT under the Domestic Building Contracts Act
- a building to which section 137E applies.

Note the comments of the Victorian Building Authority that an owner-builder is someone who takes responsibility for domestic building work carried out on their own land.

The VMIA states on its website that an owner builder is someone who is not involved in the building industry (for instance, they are not a registered builder) but takes on the responsibility of domestic building works or renovations carried out on their own property.

Consumer Affairs Victoria states that you are an owner builder if you use your own skills to build, extend or renovate your home or manage sub-contractors to do the work.

Taking all of this into account one rule of thumb is perhaps that if the owner is listed on the building permit as the builder then they are an owner builder regardless of who does the work. If there is no building permit then it seems that owner is the owner-builder regardless of who does the work and it does not matter how minor the works are, they can still be owner-builder works.

- **Does the vendor have to comply where the works are less than $16,000?**

A common mistake LPLC has seen is the failure to comply with the provisions because the value of the work was less than $16,000. Where the value of the work is less than $16,000 there is no requirement for insurance, but the warranties set out in section137C of the Building Act must still be included in the contract and the building report (less than six months old) must still be provided to the intending purchaser before the contract is signed.

- **How do I value the owner-builder works?**

There is no guidance in the legislation or cases about how to value owner-builder works and whether the value of all of the works done during the prescribed period are aggregated or considered separately.

For this reason when LPLC receives this enquiry it recommends that the practitioner advises the client to consult an expert. For example, the building surveyor or building inspector who will provide or has provided the owner-builder inspection report.

Poll

Can a contract of sale of land be subject to complying with the owner-builder obligations?

Yes

No

Don't know

Relevant legislation

Section 137B requires the building report must be given to any intending purchaser before they enter into the contract.

Section 32B of the Sale of Land Act requires details of any owner-builder insurance to be included in the section 32 statement.

- **Does the building report have to be attached to the section 32 statement?**

It is usual practice to attach this report to the section 32 statement but there is no legal requirement to do so.

Section 137B(2) of the Building Act provides that the report must be given to the intending purchaser before the vendor enters into the contract to sell the building. Attaching the report to the section 32 statement is good risk management as you ensure that it is given to the purchaser before the contract is signed.

- **Can a vendor sell off-the-plan as an owner-builder?**

It seems almost impossible for an owner-builder to comply with the requirements when selling off-the-plan as a sale off-the-plan is usually where buildings works have not commenced or are not complete. In this situation, the owner-builder will not be able to obtain the building report or the required insurance and it is unlikely that VCAT will give an exemption to any owner-builder obligations.

- **How do I obtain details of the owner-builder insurance requirements?**

Details of the insurance requirements are set out in the ministerial order dated 1 July 2003, published in *Victoria Government Gazette* Special No 98, Friday, 23 May 2003 as amended. You can find a copy of the order and any amendments on the VBA website.

□ When is owner-builder insurance required?

Insurance is required where the owner-builder works are $16,000 or more. Note also that the ministerial order says the period of insurance is for:

- six years after the "completion date for the domestic building works" for structural defects (paragraph 23(2)); and
- two years after the "completion date for the domestic building works" for non-structural defects (paragraph 23(1)).

"Completion" here means the certificate of occupancy or final inspection or practical completion.

There may be instances where the works were completed, say, six years and four months before the day of sale. In such a case no insurance certificate is required because the ministerial order says the insurance has to be for six years from the date of completion – despite the prescribed period in s137B being six years and six months.

There may also be instances where the works were completed outside this period but the certificate of occupancy or final inspection or practical completion was obtained within the 6 year period. Technically this means insurance is required.

But be warned, a practitioner has informed LPLC that in this instance VMIA has taken the position that no insurance will be provided. LPLC recommends that you verify this with the VMIA.

Where the required insurance cannot be obtained, it seems a vendor has no option than to invoke s.68 of the DBC Act and seek an order from VCAT to be exempt from the insurance requirement.

A noteup reference on Austlii will take you to a number of cases which have considered s.68 of the DBC Act.

In the case of Turriff (Domestic Building Exemption) (Building and Property) [2015] VCAT 2043 the VMIA refused insurance because of '….unduly long gap between the building permit and the final inspection….'. The owner-builder successfully obtained an exemption in VCAT.

□ Can the vendor obtain owner-builder insurance where no building permit was obtained?

A practitioner informed LPLC that the VMIA will not provide owner-builder insurance unless a building permit has been obtained. LPLC recommends that you verify this with the VMIA.

As with the previous question, where the required insurance cannot be obtained, it seems a vendor has no option than to invoke s.68 of the DBC Act and seek an order from VCAT to be exempt from the insurance requirement.

□ Are there any consequences for an owner-builder vendor after settlement?

A purchaser may sue an owner-builder vendor for a breach of the owner-builder warranties. This is one of the grounds of claim by the purchaser in the case of Fraser v Mason (Building and Property) [2019] VCAT 1009 (18 July 2019).

In this case the tribunal ordered the owner-builder vendor to pay $96,700 for the cost of remedying defective owner-builder works.

Further information

If you are looking for more information, you are fortunate because much has been written about the owner builder requirements including by the VBA, VMIA and Consumer Affairs Victoria. Also refer to the following materials:

- LPLC article – owner-builder danger zone which you will find on the LPLC website
- LPLC practice risk guide – claim free conveyancing contains details about claims and owner-builder issues.
- Unsafe as houses – owner-builders and conveyancing by Russell Cocks August 2005 LIJ
- The unknowns of owner-builder insurance by Russell Cocks September 2016 LIJ

Owner-builders – do the right thing

Ethical issues may arise in relation to disclosure of information by a vendor in particular where a vendor instructs their lawyer to not disclose a matter, contrary to the lawyer's advice.

Please contact LIV ethics if you have any ethical issues about the conduct of a client.

T: 9607 9336

E: ethics@liv.asn.au

Exercise

You act for a vender who has undertaken substantial renovations at their property without a building permit. The vendor says they do not intend on complying with the owner-builder requirements against your advice.

Question

Can you terminate the retainer?

Yes

No

Don't know

Owners corporations

Exercise

Background

You act for a vendor selling a villa unit. The site has a common driveway which is identified as common property on the plan of subdivision. There are 5 villa units in the plan.

The vendor has their own replacement and contents insurance which also covers public liability for the common driveway for $20m.

S.11 of the Sale of Land Act provides that:

> 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 for any insurance required by that Act to be effected by the owners corporation.

Question

Has the vendor complied with section 11 of the Sale of Land Act?

Yes

No

Don't know

Introduction

LPLC regularly receives enquiries from practitioners about owners corporations issues mostly in relation to the sale of land and insurance obligations imposed on the vendor and owners corporation.

To deal with these issues it is usually necessary to consider both the Sale of Land Act 1962 and the *Owners Corporations Act 2006* (Vic).

Section 11 and section 32F of the Sale of Land Act and sections 59 – 61A of the Owners Corporations Act are the most relevant sections.

Dealing with owners corporations issues is perhaps even more difficult since the recent amendments which created 5 tiers of owners corporations. Refer to the *Owners Corporations and Other Acts Amendment Act 2021* (Vic) which commenced operation on 1 December 2021.

Your comments

Issues raised with LPLC

The following is a list of the most common issues raised with LPLC.

□ How to comply with s.32F of the Sale of Land Act

Where an owners corporation is **active**, section 32F of the Sale of Land Act says a vendor must include in the section 32 statement certain prescribed information in accordance with section 151(4)(a) of the *Owners Corporations Act* or attach to the section 32 statement an owners corporations certificate which contains this information.

Examples of the sort of information required includes:

- fees payable in respect of the lot
- OC insurance
- details of any notices and orders served on the owners corporation

If vendor chooses not to attach the owners corporation certificate, then it is expected that the information referred to in section 151(4)(a), which would have usually been in the certificate, will appear in the section 32 statement.

For an active owners corporation a vendor must also include in the section 32 statement a copy of the owners corporation rules, the statement of advice and information for prospective purchasers and lot owners prescribed in schedule 3, regulation 12 of the *Owners Corporations Regulations 2018* (Vic) and also the resolutions of the last annual general meeting.

Where the owners corporation is **inactive**, the owners corporations information prescribed by section 32F can be omitted but the vendor must specify in the section 32 statement that the owners corporation is inactive.

□ Meaning of inactive

Another enquiry to LPLC is the meaning of 'inactive'.

A definition of inactive is contained in section 32F of the Sale of Land Act.

'Inactive' means the owners corporation has not, in the previous 15 months:

- had an annual general meeting
- fixed any fees
- held any insurance.

The owners corporation won't meet this definition of inactive where common property insurance is obtained in the name of the owners corporation.

□ Section 11 of the Sale of Land Act

Another common enquiry received by LPLC is whether insurance obtained by the vendor comply with section 11 of the Sale of Land Act.

Section 11 provides that a person cannot sell a lot affected by an owners corporation unless the **vendor** or the **owners corporation** holds the insurance required by the Owners Corporations Act.

One interpretation of section 11 is that the insurance can be in the name of the vendor or the owners corporation. For example, public liability insurance for $20m can be in the name of the vendor or owners corporation so long as it covers the common property.

Another interpretation is that the starting point is to consider the insurance obligations in the Owners Corporations Act which are imposed on a vendor compared to the owners corporation.

Example – owners corporation insurance v vendor insurance

In relation to insurance required to be taken out by the owners corporation, see section 60 of the Owners Corporations Act which states that an owners corporation must take out public liability insurance for the common property.

In relation to insurance which can be taken out by the vendor refer to section 55 which provides that:

> *Nothing in this Act or the regulations limits the right of a lot owner to effect a policy of insurance in respect of destruction of or damage to the lot owner's lot or the lot owner's interest in the common property.*

The first interpretation perhaps seems more logical given that a vendor's insurance may cover the common property for any public liability and that the main purpose of section 11 seems to be that insurance is in place regardless of whose name the insurance in in.

The most conservative seems to be to have any required insurance in the name of the owners corporation and practically that it may not be possible to obtain the required OC insurance in the name of the vendor.

In relation to any required insurance, LPLC recommends that practitioners inform their clients that they should contact their broker or insurer to discuss.

LPLC also recommends that practitioners warn their clients that a breach of section 11 of the Sale of Land Act will give a purchaser the right to rescind the contract.

- **What is the solution for a vendor where the other lots owners will not agree to take out any insurance required by the Owners Corporations Act?**

A number of practitioners have informed LPLC of the difficulty of obtaining owners corporations insurance where the insurance is only for the common property, such as a common driveway. Apparently insurance companies do not wish to only insure the common property but want to insure all buildings and the common property. This may lead to another problem. The vendor cannot reach agreement with the other lot owners about the insurance.

Given the serious consequences where the vendor cannot comply with section 11, the vendor may have no choice than to seek an order from VCAT imposing an obligation on all lot owners to pay for any required insurance.

It may be that this process takes some time to complete satisfactorily which may result in a delay in selling the property.

In this situation the client may be tempted to instruct their practitioner to ignore the owners corporations insurance requirements and vendor disclosure obligations, against the advice of their practitioner.

Where a client will not act on the advice of their practitioner, the practitioner may be entitled to terminate the retainer.

Terminating a retainer can be a complicated ethical issue to consider and resolve. Given this LPLC recommends that practitioners contact LIV ethics before terminating a retainer.

□ **When is an owners corporation exempt from the insurance requirements?**

Some owners corporations are exempt from compliance with the insurance obligations in the Owners Corporations Act. These are two lot subdivisions (See section 7A of the OC Act).

The other type of exempt OC are owners corporations that only deal with common services. See section 8 of the OC Act.

Both of these types of owners corporations are now known as tier five owners corporations since the amendments of the OC Act on 1 December 2021.

The main insurance provisions in the Owners Corporations Act are in relation to:

- Replacement insurance for all buildings on common property. See section 59.
- Common property public liability insurance. See section 60.

The Owners Corporations Act also provides that nothing in the Act limits a lot owners right to obtain their own insurance. See section 55.

And that lot owners may pass a special resolution to obtain their own insurance. See sections 61A and 63.

Practitioners are also referred to the information about owners corporations published by Consumer Affairs Victoria website. When you are on the CAV homepage you need to click on 'Housing' and then 'Owners Corporations.

Further information

Owners Corporations – a major reform by Norman Mermelstein and Neville Sanders December LIJ 2021. The changes are contained in the Owners Corporations and Other Acts Amendment Act 2021.

Consumer Affairs Victoria

Owners corporations – do the right thing

Ethical issues may arise in relation to owners corporations.

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E: ethics@liv.asn.au

Exercise

You act for a first-time developer. The client wishes to construct 5 townhouses and will retain one and sell the other 4. The driveway for the townhouses is common property. The client seeks your advice on ensuring the town house they will retain has a lower lot liability to the other town houses but a higher lot entitlement.

Question

What advice would you give this client?

Your comments

Reflection

Once you have completed reading this booklet and watching the accompanying webinar, Conveyancing and three key issues, take time to reflect on what you have you learned that might help you and your colleagues in your work.