

CONVEYANCING SERIES 2023

Purchaser finance and terms contracts

Presented by: Phil Nolan, Risk Manager | LPLC



Quote

The reasonable person adapts to the world; the unreasonable one persists in trying to adapt the world to themselves.

George Bernard Shaw



Agenda

1. Purchaser finance

2. Terms contracts



PURCHASER FINANCE INTRODUCTION



Purchaser finance - five key points

- 1) Make sure the proposed date for the approval of the loan is realistic.
- 2) Consider the need to seek an extension of the approval date.
- 3) Inform the purchaser client of their obligation to use their best endeavours to obtain finance.
- 4) Make sure any approval or refusal of finance is in writing.
- 5) If the contract is to be terminated, it must be done so in accordance with the contract and in clear and unequivocal terms.



Poll

In your experience, how long would it usually take for a purchaser to obtain finance approval?

- a) 14 days
- b) 21 days
- c) 28 days
- d) More than 28 days





CLAIMS



**KEEP
CALM**

&

AVOID-A-CLAIM

Claims – purchaser finance

Recent claims include:

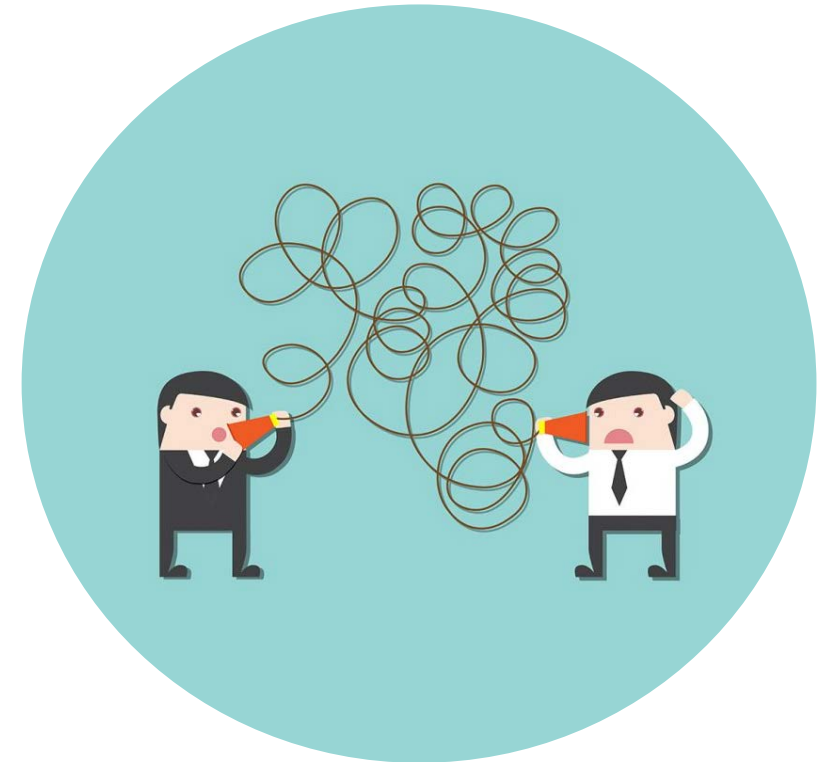
- an allegation that the practitioner failed to negotiate a subject to finance clause to be included in the contract.
- a failure to advise on the operation of a subject to finance clause.



Underlying causes of claims

Based on an analysis of our claims data it seems that the two major underlying causes of claims are:

- Poor communication
- Poor systems, precedents and processes.



Poll

Do you have a precedent letter that you give to purchaser clients covering issues like subject to finance conditions?

- a) Yes
- b) No



CASES



Cases - purchaser finance

Umbers v Kelson [2008] VSC 348

Putt v Perfect Builders Pty Ltd [2013] VSC 442 and
[2013] VSC 600

'I am not satisfied...that they...have fulfilled their obligation.....to do everything reasonably required to obtain approval of such a loan.'



Cases - purchaser finance

Stoilas & Tsogas v Mazzocchetti [2013] SADC 74

'In my view, they fulfilled their obligation to use their best endeavours when they made their application there [for the loan].'

Pearl v Nannegari & Ors [2021] VSC 468



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GENERAL CONDITION 20



Poll

Which of the following is evidence of the refusal of finance?

- a) A letter from the purchaser's legal representative.
- b) A letter from the finance broker for the purchaser.
- c) A letter from a lender for the purchaser.



CONTRACT ADVICE



Contract advice – purchaser finance

Advice about subject to finance conditions may occur:

- Pre-contract – prior to exchange;
- During the cooling-off period;
- Post contract – after exchange and after any cooling-off period has expired.



DO THE RIGHT THING



Do the right thing

Ethical issues may arise in relation to purchaser finance.

Help

If you have an ethical issue, contact LIV ethics via phone on: **03 9607 9336** or via email at: ethics@liv.asn.au



Exercise

Background

You act for a vendor selling their home. You have received the signed contract from the selling agent and note that it is subject to finance and the cooling-off period has expired.

The purchaser is well known to the selling agent, so the agent asks you to also act for the purchaser.

Question

Do you have a conflict?

- a) Yes b) No c) Not sure






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  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!



TERMS CONTRACTS



TERMS CONTRACTS INTRODUCTION



Terms contracts - five key points

- 1) Always check the Sale of Land Act 1962 (Vic)
- 2) If the contract is a terms contract obtain instructions as to whether this is intended
- 3) Advise the client in writing of their options and the consequences of entering into a terms contract
- 4) Advise clients of the risks of entering into a terms contract
- 5) Consider the need to refer the client to their accountant and/or financial advisor



CLAIMS



**KEEP
CALM**

&

AVOID-A-CLAIM

Claims – terms contracts

- Unaware of the relevant law
- Failure to recognise the contract is a terms contract
- Failure to advise vendor of obligations
- Failure to advise purchaser of the right to terminate



CASES



Cases – terms contracts

Gray v Latter [2014] NSWC 122

Ottedin Investments Pty Ltd v Portbury
Developments Co Pty Ltd [2011] VSC 222



Questions



LEGISLATION



Legislation – terms contracts

Sale of Land Act 1962 (Vic)

- s.29A – s.29W

Note 2020 amendments:

- s.29EA
- s.29EB
- s.29EC



questions

GENERAL CONDITION 30



General condition 30 – terms contracts

GC 30 sets out the conditions which apply where the sale is on terms including:

- The obligation for any mortgage affecting the land sold to be discharged
- Payment of the purchase price to discharge any mortgage.



Exercise

What **special conditions** do you include in a terms contract?



DO THE RIGHT THING



Do the right thing

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Help

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Exercise

S.29W of the Sale of Land Act provides that:

A legal practitioner or conveyancer whose principal place of business is within a 50 kilometer radius of the intersection of Elizabeth and Bourke Streets in Melbourne must not act for both vendor and purchaser under a terms contract.



Poll

Can a law firm who has an office in the Melbourne CBD, but also has an office in the Sydney CBD, act for both the vendor and purchaser under a terms contract?

- a) Yes
- b) No
- c) Don't know





REFLECTION

What have you learned from this session and materials that might help you and your colleagues in your work?



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