

# CONVEYANCING SERIES 2023

Mastering the essentials



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LIABILITY  
COMMITTEE



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# Conveyancing series | Purchaser finance and terms contracts

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## Quote

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

## 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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## Purchaser finance - five key points

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

### Introduction

LPLC receives many enquiries about subject to finance issues.

Most enquiries are from those acting for the purchaser and where there is a dispute about the interpretation of the subject to finance general condition.

Some enquiries are about special conditions which deal with any loan approval to be obtained by the purchaser. Usually, these special conditions impose more onerous obligations on the purchaser compared to the general condition in the Law Institute of Victoria (LIV) contract of sale of land. For example, that any evidence of rejection of the loan application must be in the form of a letter from the lender named in the particulars of sale.

Other enquiries to LPLC are about exactly what is required of a purchaser to satisfy the lender or that they have acted reasonably and without delay in fulfilling their contractual obligations.

In the current environment with the likely further increase in interest rates and talk about businesses continuing to operate in a reduced capacity, practitioners can expect that the conditions on finance approval are likely to be more numerous and more open ended than ever before.

This is another reason it is important to put your purchaser / nominee clients on notice as early as possible that finance approval may be conditional and, in some cases, may be withdrawn for various reasons outside their control.

### Poll

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

- 14 days
- 21 days
- 28 days
- More than 28 days

## Claims

LPLC regularly sees claims where a purchaser makes allegations against their legal practitioner that they have breached their duty of care to the client by failing to properly advise the client about the subject to finance conditions in the contract.

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.

Over the years claims have also arisen where the practitioner:

- failed to notice, or check, that an approval letter for finance is subject to valuation, which when received is too low for the purchaser's requirements, by which time the contract is unconditional;
- failed to realise that the amount approved is less than what was required for settlement; and
- failed to follow up a request for an extension of the subject to finance clause within the time in which the clause expires to ensure the extension is granted.

### **Claim example - undocumented extension**

In one claim, the vendor's practitioner was exposed to liability because of the failure to document extensions of the due date for approval of finance.

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

### **Underlying causes of claims**

Based on an analysis of our claims data, where a contract is subject to finance, it seems that the two major underlying causes of claims are poor communication and poor systems, precedents and processes.

#### **Poor communication**

These claims often involve the failure to give the client enough information to make an informed decision.

The situation is worse where the client has never retained a practitioner before and does not know how to work effectively with them.

This lack of understanding also contributes to claims that could have been avoided or minimised if there had been better communication between the practitioner and the client.

To help practitioners manage their clients' expectations as well as explain both the client's and lawyer's roles and obligations in the relationship LPLC has developed a sample information brochure [Working together - roles and](#)

[obligations](#) to illustrate what could be done. You will find the brochure on our website here:

<https://plc.com.au/resources/client-resources/working-together-roles-obligations>

### Poor systems, precedents and processes

This is about how firms actually do the work. Mistakes occur because the practitioner doesn't use workflows or checklists to make sure things are not overlooked, or they don't use precedent letters with all the relevant advice in them or regularly review and update their precedent letters.

### Poll

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

- Yes
- No

Being vigilant about keeping up with the changes to law in conveyancing, reading relevant cases and diligently considering the legal issues and managing the client and the matter can go a long way to minimising exposure to conveyancing claims.

Below is a list of some of the cases relevant to this area of law and which you should be familiar with.

## Cases

### Umbers v Kelson [2008] VSC 348

In this case the purchaser argued that the letter from his lawyers to the other side constituted notice that the contract was at an end.

The letter advised that finance had not been approved, requested an extension and advised that if an extension was not granted then the:

"..... letter may be treated as written notice ending the contract in accordance with general condition 4 of the contract....".

On appeal the court was not satisfied that letter was a written notice ending the contract and hence it did not:

'....constitute a valid exercise of the contractual power given to the purchaser to terminate the contract and was ineffective. It was an approach by the purchaser to the vendors to seek an extension of the finance approval clause and, in terms, left with the vendors the option to accept the letter as a notice terminating the contract if the vendors wished to do so. The purchaser tried to "have his cake and eat it". The letter did not end the contract and, so, the contract remained on foot....'.

The main takeaway from this case is, where the client wants to end the contract, you must do so in clear and unequivocal terms.

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

In Putt's case, general condition 14 of the contract prescribed by the *Estate Agents (Contracts) Regulations 2008 (Vic)* applied.

The particulars of sale specified that the contract was subject to a loan of \$475,000 being approved by 4 June 2013 from AGF Home Loans.

The purchaser applied for a loan greater than the amount specified.

The court refused to grant an order for the return of the deposit to the purchaser, as the court was not satisfied that the purchaser had:

*".....fulfilled their obligation under general condition 14.2(b) to do everything reasonably required to obtain approval of such a loan....."*

### **Stoilas & Tsogas v Mazzocchetti [2013] SADC 74**

This case is a good example of where a purchaser did use their best endeavours to obtain finance.

In this case, the purchaser's application to NAB was rejected.

The purchaser also approached Commonwealth Bank and used a mortgage broker with no success.

The purchaser successfully obtained judgment for return of the deposit on the basis that the purchaser had validly terminated the contract having failed to obtain finance.

### **Pearl v Nannegari & Ors [2021] VSC 468**

In this case general condition 14 applied and the particulars of sale provided for loan approval by HSBC for a loan of \$1,500,000 with a finance approval by 10 April 2020.

The parties agreed to extend the time for approval to 20 April 2020.

On 20 April an extension to 27 April was sought but not granted.

On 4 May the vendor's legal representative served a default and rescission notice.

The court held that the vendor validly rescinded the contract and the failure to apply to HSBC for the loan amounted to non-compliance with the obligation to do everything reasonably required and so rendered the contract unconditional as to finance.

The purchaser ran a number of unsuccessful arguments including that the vendor was estopped from serving the default notice.

## Analysis of general condition 20 (previously GC 14)

Subject to finance clauses are usually in the now standardised form in general condition 20 of the current LIV form of contract of sale of real estate.

Although, special conditions may impose additional or different obligations on a purchaser.

It is good risk management to check any amendments / additions to the general conditions and highlight this to the client. Usually the client is the purchaser but sometimes a nominee also needs this advice

One example of an amendment is the deletion of the '2 clear business days' for giving notice after the approval date.

Those acting for the purchaser may also seek to amend the general condition.

For example, by including a special condition that the vendor will permit the lender's valuer access to the property for the purposes of determining the value of the property for loan approval purposes.

General condition 20 can be used as a roadmap to identify various matters you need to discuss with your purchaser client, including:

- the specified date for approval of the loan;
- using best endeavours to obtain the loan;
- the need to tell you when finance is approved or, if not, that the options are to arrange an extension, cancel the contract, or proceed unconditionally;
- the need to provide evidence of the inability to obtain finance; and
- that the purchaser must not be in default under any condition of the contract.

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

Some clients take the subject to finance general condition quite literally and assume that if finance is not approved the contract is void.

Such clients, acting under the wrong assumption, are likely to fail to alert their practitioner when finance is not approved by the due date and the practitioner may assume that finance has been approved because they have not heard anything to the contrary from the client.

Good risk management includes ensuring the general condition (as varied) is explained to the client including that evidence is required.



## Poll

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

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

## Contract advice

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.

Based on the LPLC claims data, it seems there is a higher risk of a claim when advising pre-contract and during the cooling-off period. Given this, it is important that advice in these circumstances is thorough and in writing to have the best chance to avoid a claim.

The most appropriate opportunity to be thorough is when advice is first provided to the client. This may be by written advice or orally such as by phone or video when the client first contacts the firm.

What our claims data also discloses is that giving written advice will probably mean the practitioner has the best chance to defend any allegation that thorough advice was not given, especially in relation to issues like subject to finance conditions.

The advice provided to the client should:

- Determine whether the proposed approval date is reasonable;
- Note the date on which the contract becomes unconditional;
- Note what is required to be done by the purchaser acting reasonably;
- Note what is required to be done by the purchaser where finance is not obtained before the approval date;
- Clearly explain the consequence of not complying with the provision, that is, that the contract becomes unconditional if notice to terminate the contract is not given to the vendor within time.
- Clearly state that it is the purchaser's responsibility to provide instructions about whether finance has been approved
- Direct the client to read their letters of offer carefully, and if in any doubt, give you a copy to review before the contract becomes unconditional.

If a client instructs that it has obtained finance, obtain a copy (if possible) of the finance approval letter before the contract becomes unconditional to ensure the finance approval is final, not conditional and for a sufficient amount. If the finance

approval is not final, consider obtaining an extension so that the contract remains conditional. Any extension should be agreed in writing.

### **Poll**

Do you use a pre-contract checklist that asks the purchaser about finance approval?

Yes

No

## **Do the right thing**

Ethical issues may arise where a client is buying a property subject to finance.

Please contact LIV ethics if you are seeking guidance about an ethical issue.

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### **Exercise – conflict of interest**

#### **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?

- Yes
- No
- Not sure

## Comments about conflicts

Conflict of interest issues can be complicated.

In one claim the practitioner acted for the vendor and purchaser. The contract of sale was initially unconditional.

The practitioner sent their usual standard letter to the purchaser which contained some information about subject to finance clauses. The purchaser asked the practitioner's conveyancing clerk to request an amendment to make the contract subject to finance.

The clerk discussed with the vendor some issues regarding the way subject to finance clauses worked but the extent of the advice was unclear. Ultimately the vendor agreed to a two-week subject to finance clause.

Three days before the two week-period ended, the purchaser informed the clerk in person that his bank loan was approved and provided a bank guarantee for the deposit amount. The practitioner acted on these oral instructions and advised the vendor that he had received the deposit and the contract was now unconditional.

The purchaser did not obtain finance but did not notify the practitioner. Settlement did not occur and the deposit was forfeited to the vendor.

The purchaser brought a claim against the practitioner and alleged the practitioner had failed to advise on the meaning and effect of the subject to finance clause, including the need to notify the vendor of the intention to terminate the contract within the specified time. The purchaser denied receiving the general letter of advice from the practitioner which referred to subject to finance.

The claim was difficult to defend because the practitioner acted for both parties and did not have contemporaneous records of instructions and advice.

Importantly key advice about the meaning and effect of the contract of sale should have been provided by the practitioner rather than the clerk. This was especially important where the contract terms changed and the advice needed to be confirmed in writing.

The practitioner should also have confirmed the purchaser's instruction that finance had been obtained in writing.

This claim would probably have been avoided had the practitioner identified the potential for conflict at the point when the contract was made subject to finance and ceased acting.

## Terms contracts - five key points

- Always check the Sale of Land Act 1962 (Vic) to determine the current requirements relating to terms contracts and consider whether a terms contract will be created
- If the contract is a terms contract obtain instructions as to whether this is what the client intends
- Advise the client in writing of their options and the consequences of entering into a terms contract
- Advise clients of the risks of entering into a terms contract
- As entering into a terms contract may involve a client making financial decisions, consider the need to refer the client to their accountant and/or financial advisor

## Introduction

Terms contracts are rare so it is not uncommon for practitioners to have little or no experience in this area.

Unfortunately, some terms contracts are created by mistake, probably out of ignorance. Where this occurs there is the possibility a purchaser who has other reasons for wanting to get out of the contract, will look to call on their right to rescind.

The best risk management when it comes to terms contracts is don't dabble. A practitioner who does not have relevant experience should refer the client to a firm who has this expertise.

Firms who have experience in this area will have their own set of special conditions dealing with some of the common terms contract issues in addition to those dealt with in general condition 30 including:

- Any early repayment rights
- Terms of any mortgage back
- Livestock issues
- Subdivision before completion

It is also expected that these firms will have a precedent form of additional section 32 statement and a proforma detailed letter of advice to the client.

## Claims

Practitioners for both vendors and purchasers incur claims involving terms contracts, usually because they are unaware of the relevant law and fail to recognise the contract is a terms contract.

As a consequence, vendors' practitioners don't advise their clients of what needs to be done to comply with the requirements in the Sale of Land Act and the consequences of not complying.

Purchasers' practitioners fail to advise their clients they could rescind? the contract.

### **Possession allowed before payment of residue**

A practitioner was approached by a client who proposed to buy a large farming property for future development.

The client intended to borrow and mortgage the property to fund the purchase and subdivision of the land.

He was going to then sell the lots off-the-plan and give the purchasers possession prior to payment of the residue but after registration of the plan of subdivision thereby creating a terms contract within the definition of s.29A of the Sale of Land Act.

The practitioner failed to recognise that by selling on terms, the client would not be permitted to mortgage the land. The purchaser was forced to fund the acquisition without mortgaging the land and brought a claim against the practitioner for failing to properly advise him of the impact of creating terms contracts.

Below is a list of some of the cases relevant to this area of law and which you should be familiar with.

## Cases

### **Gray v Latter [2014] NSWSC 122**

This case considered whether the consumer credit code applied to a contract which provided for vendor finance.

Vendor finance was agreed on terms that the purchaser would make repayments of \$300 per week but they would have to repay the balance of the purchase price of about \$240,000 after two years.

The purchaser was unable to refinance the loan before the two years expired so the vendor sought possession of the land and judgment in the amount of the purchase price.

The court rejected the purchaser's argument that the vendor had breached the code which would result in the loan being invalid. The court's view was that the vendor was not engaged in a business so the code did not apply.

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

This case considered the meaning of terms contracts and whether payment of multiple amounts for the 'deposit' constituted a terms contract.

In December 2008 the parties entered into a contract for the sale of land for \$6.5 million with a deposit of \$325,000 and settlement due in 12 months.

When the purchaser was unable to settle the parties varied the contract to provide for a deposit of \$1,325,000 with \$325,00 due on the day of sale and \$1,000,000 due in January 2010 with the balance payable by two instalments, one

of \$3,675,000 and the balance of \$1,500,000 payable at settlement.

Justice Dixon rejected the purchaser's contention that this created a terms contract because both the initial \$325,000 and the increased deposit of \$1,000,000 were each obligations to pay the deposit.

## Legislation

Below is a brief summary of sections 29A – 29W in the Sale of Land Act. Practitioners should not rely on this summary but should read all of the sections carefully.

### **S.29A**

A terms contract is constituted by:

- Sales where more than two payments are made other than the deposit or final payment; or
- Possession or the right to receipt of rents and profits is given before the purchaser becomes entitled to a conveyance or transfer of the land.

The definition of deposit makes it clear that a deposit is a part of the purchase price specified in the contract where the deposit is required to be paid within 60 days of the execution of the contract. It can be paid in more than one instalment provided it is paid within the 60 days.

Any amount paid by a purchaser as a result of a default by them does not make the contract a terms contract.

### **S.29B**

A person may not sell on terms unless that person is the registered proprietor of the land, presently entitled to become registered, or entitled pursuant to statute to sell.

### **S.29C**

A vendor may seek an exemption from the prohibition in s.29B with consent of an arbitrator.

### **S.29D**

Explanation of when a vendor is presently entitled to become the registered proprietor for the purposes of s.29B(2).

### **S.29E**

Any mistake or mis-statement in a terms contract relating to the description, measurement or area of the land agreed to be sold is to be disregarded unless it is a material mistake or mis-statement.

### **S.29F**

Sets out the grounds on which a purchaser may avoid a prohibited terms contract.

### **S.29G**

Contains a prohibition on contracting out of the terms contract requirements in the Sale of Land Act.

#### **S.29H**

A purchaser pursuant to a terms contract may call upon the vendor to transfer the land to the purchaser upon the purchaser entering into a mortgage over the land in favour of the vendor for the balance due under the terms contract.

#### **S.29I**

Specifies certain provisions which the mortgage required under s.29H must contain.

#### **S.29J**

Sets out the consequences where a vendor does not comply with s.29H.

#### **S.29K**

States that this subdivision in the Sale of Land Act applies despite anything in the Trustee Act 1958 or in any other Act (other than the Charter of Human Rights and Responsibilities).

#### **S.29L**

A party can call on an arbitrator to determine any outstanding dispute about the instrument of transfer, conveyance or mortgage.

#### **S.29M**

A vendor cannot sell land on terms if the land is mortgaged, unless:

- the land sold is the only land subject to the mortgage; and
- the contract contains special conditions in relation to application of the proceeds of sale or, alternatively, the mortgage is discharged within 90 days of the sale.

#### **S.29N**

Provides that a terms contract is voidable by the purchaser at any time before completion of the contract where the terms contract is entered into in contravention of s.29M.

#### **S.29O**

S.29M does not apply if the terms contract provides that any mortgage is to be discharged before the purchaser becomes entitled to possession or receipt of the rents and profits.

#### **S.29P**

A vendor of land sold on terms cannot subsequently mortgage that land.

#### **S.29Q**

A vendor may require a purchaser under a terms contract to take a transfer of the land and give a mortgage back to the vendor for the balance due under the contract. The purchaser may also require the vendor to advance duty payable on the transfer.

### **S.29R**

A vendor must also advance the duty amount to the purchaser where requested by the purchaser and where there is a transfer and mortgage back under s.29Q.

### **S.29S**

If land is mortgaged in contravention of s.29P, s.29Q or s.29R the purchaser may avoid the terms contract at any time before the completion.

### **S.29T**

If the purchaser fails to comply with a notice under s.29Q the purchaser is deemed to have breached a condition of the contract and the vendor is entitled to seek remedies for that breach.

### **S.29U**

A party can call on an arbitrator to determine any question as to the sufficiency of the instrument of transfer, conveyance or mortgage.

### **S.29V**

A mortgagee is not deemed to have constructive notice of the interest of a purchaser.

### **S.29W**

Prohibition on acting for vendor and purchaser.

## 2020 changes

The [Sale of Land Act Amendment Act 2019](#) (Vic) introduced several important consumer reforms to the Sale of Land Act including prohibiting certain terms contracts.

### **S.29EA**

A person must not knowingly sell any residential land (other than residential land that is agricultural land) under a terms contract where the sale price of the land is less than the prescribed amount.

The prescribed amount is \$750,000.

See reg. 6 of the Sale of Land (Exemption) Regulations 2020.

### **S.29EB**

It is an offence to arrange, broker or induce certain terms contracts for residential land where the sale price is less than the prescribed amount.

### **S.29EC**

It is an offence to advertise for sale residential land subject to a terms contract where the sale price is less than the prescribed amount.

## Additional section 32 statement

S.32A(d) of the Sale of Land Act provides that:



'...in the case of a terms contract where the purchaser is obliged to make 2 or more payments to the vendor after the execution of the contract and before the purchaser is entitled to a conveyance or transfer of the land, the information set out in Schedule 2....'.

Schedule 2 contains a list items in relation to the finance to be provided by the vendor including number of repayments, amount of repayment, standard and penalty interest rates.

A precedent additional section 32 statement is available from elawforms.

## Analysis of general condition 30

The standard LIV form of contract of sale of land contains a number of references to terms contracts.

### Particulars of sale

Checking the relevant box in the particulars of sale identifies the sale as a terms contract. This item in the particulars of sale also refers practitioners to general condition 30 and states that:

*'.....any further applicable provisions should be added as special conditions....'.*

### General condition 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 as to that land before the purchaser becomes entitled to possession or to the receipt of rents and profits unless the vendor satisfies s.29M of the Sale of Land Act; and
- The deposit and all other money payable under the contract (other than any money payable in excess of the amount required to so discharge the mortgage) must be paid to a legal practitioner or conveyancer or a licensed estate agent to be applied in or towards discharging the mortgage.

The general condition also deals with a number of other issues including:

- Insurance obligations imposed on the purchaser and the right of the vendor to insurer if the purchaser fails to meet these obligations;
- Maintenance and repair obligations imposed on the purchaser.
- A prohibition on any alterations without the consent of the vendor which must not be unreasonably refused or delayed;
- The vendor's right to inspect on giving 7 days written notice, but not more than twice in a year.

## Do the right thing

Ethical issues may arise in relation to terms contracts.

Please contact LIV ethics if you have any ethical issues about a terms contract.

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### Exercise – conflict of interest

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?

- Yes
- No
- Don't know

## Reflection

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