

OFF THE PLAN CONTRACTS 2011

**JONATHAN TISHER
TISHER LINER & CO.**

1. AMENDMENTS TO THE SALE OF LAND ACT

- 1.1 The Consumer Affairs Legislation Amendment (Reform) Act 2010 (Vic) was passed with amendments on 16 September 2010 and received royal assent on 12 October 2010. It amends section 9AA of the *Sale of Land Act 1962* and is expected to take effect from 1 September 2011 unless proclaimed earlier.
- 1.2 Initially it was proposed to amend the amount of the deposit payable for off the plan contracts by increasing it from 10% to 20%. The amendment is no longer proceeding and the maximum deposit of 10% has been maintained.
- 1.3 The amendments which will take effect as of 1 September 2011 (unless proclaimed earlier) include the following:

(a) **Investment of deposit**

The purchaser and vendor will no longer have the option of opening a special purpose account in their joint names for investment of the deposit which is currently allowed pursuant to sections 9AA(2)(b) and 9AA(3) of the *Sale of Land Act*.

Current provisions:

Section 9AA(2) of the *Sale of Land Act* currently provide that *“The deposit moneys paid by the purchaser prior to the registration of the plan under a prescribed contract of sale of a lot shall be paid (as the case requires):*

(a) to the legal practitioner, conveyancer or licensed estate agent acting for the vendor; or

(b) into a special purpose account in the authorised deposit taking institution in Victoria in the contract in the joint names of the purchaser and the vendor.”

Section 9AA(3) of the *Sale of Land Act* provides that *“An account under subsection (2)(b) may be drawn upon only with the signature of*

both the vendor and the purchaser or the personal representative of the vendor and purchaser (as the case may be)."

Section 9AA(4) of the *Sale of Land Act* provides *"Nothing in this section shall impose any additional liability upon the authorised deposit-taking institution in respect of any money deposited pursuant to subsection 2(b)(b)."*

New provisions:

Section 9AA(2) of the *Sale of Land Act* is amended by a new provision (in substitution of the current provision) which provides *"The deposit moneys paid by the purchaser before the registration of the plan under a prescribed contract of sale must be paid to the legal practitioner, conveyancer or licensed estate agent acting for the vendor."*

Sections 9AA(3) and (4) of the *Sale of Land Act* are repealed.

Section 9AA(6) of the *Sale of Land Act* is amended by a new provision (in substitution of the current provisions) which provides *"In this section (except 1(b)) and section 9AF, deposit moneys in relation to the sale of a lot includes any moneys which are part of the purchase price received by the vendor or on behalf of the vendor before the purchaser becomes entitled to a transfer or conveyance of the lot."* The original provision also referred to the special purpose account, but this has been deleted.

Transitional provisions seek to protect money already paid into joint accounts immediately before the Act commences. This is set out in a new section 51 of the *Sale of Land Act* which provides *"Despite the commencement of section 65 of the Consumer Affairs Legislation Amendment (Reform) Act 2010, section 9AA of this Act as in force immediately before that commencement continues to apply –*

(a) in respect of any deposit moneys paid into a special purpose account established under section 9AA;

(b) for the purposes of the reference to section 9AA in section 9AE(1) in respect of a relevant contract of sale that was signed before that commencement."

(b) **Prominent warnings**

It will now be a requirement that on an off the plan contract, the front page of the contract contains a prominent warning to the purchaser stating:

- Subject to the limit set by section 9AA(1)(b) of the *Sale of Land Act* (which is 10%), the purchaser may negotiate with the vendor about the amount of the deposit payable under the contract;
- A substantial period of time may elapse between the day of sale and the day on which the purchaser becomes the registered proprietor of the lot; and
- The value of the lot may change between the day of sale for that lot and the day on which the purchaser becomes the registered proprietor.

These amendments will be contained in section 9AA(1A) of the *Sale of Land Act*.

1.4 Section 9AE of the *Sale of Land Act* continues to provide that if a vendor does not comply with sections 9AA (which deals with the requirements for the payment of the deposit) or 9AB (which deals with disclosure of natural works to the surface of the land) of the *Sale of Land Act*, the purchaser may rescind the Contract. Accordingly, non compliance with the amended provisions would allow a purchaser to rescind the contract.

1.5 Practitioners should monitor and keep themselves updated on the amendments to the legislation.

1.6 There are a number of implications of the amendments including:

- (a) Solicitors should not include a covering page with a picture of the development as this may be deemed the front page of the contract.
- (b) Any contracts that have been submitted prior to 1 September 2011 but which have not been signed should be recalled and amended.
- (c) Solicitors need to be able to clearly identify monies held in trust as part of a particular transaction.

2. CLAUSES ALLOWING VENDORS TO ENTER LONG TERM LEASES, LICENCES AND AGREEMENTS WITH THE OWNERS CORPORATION OR REQUIRING THE PURCHASER TO ENTER AGREEMENTS

2.1 Contracts of Sale often include special conditions which either give the vendor the right to enter into long term leases or licences with the Owners Corporation or require that the purchaser sign documents or vote in a particular manner to allow the vendor to enter into long term leases or licences.

Examples may include signage rights, car parking entitlements, solar panelling, etc. Such conditions can give the vendor a continued income stream after the development is completed by controlling the common property for a long period of time.

2.2 The ability of the Owners Corporation to enter into a long term lease or licence is regulated by section 14 of the *Owners Corporations Act 2006* which provides that by special resolution, an Owners Corporation may lease or licence the whole or any part of common property to a lot owner or other person.

2.3 From the vendor's perspective, once the plan of subdivision has been registered but before settlement, the vendor controls the Owners Corporation. At that point in time, the vendor can, by a special resolution cause or enter into a lease or licence with a third party of the common property or part of it.

2.4 The contract of sale should contain a special condition which gives the vendor the right to enter into the lease or licence and should disclose the terms. Ideally, a copy of the proposed lease or licence should be attached to the contract and the special condition in the contract should give the vendor the right to amend the terms of the lease or licence if required. The greater the disclosure, the less likely that a purchaser / owner will be successful at a later point in time, if they seek to challenge the proposed lease or licence.

2.5 It is not uncommon for a vendor to include detailed special conditions in a contract of sale in respect to the Owners Corporation and common property. A common provision will state that whilst the vendor is an owner of a lot in the development, the purchaser will not vote in a particular manner. The vendor will seek to control the Owners Corporation and the common property to ensure that they can complete the development (if carried out in

stages) or alternatively to give itself the right to enter into agreements. Vendors also seek to rely upon a proxy in the contract pursuant to section 87 of the *Owners Corporations Act*.

Arguably the provision which states that the purchaser must vote in a particular manner whilst the vendor is an owner of a lot is akin to a proxy. There are specific requirements for proxies noting that the proxy can only continue for a period of 12 months and there is a requirement to act in good faith. In addition, section 89 of the *Owners Corporations Act* provides that a vendor cannot require or demand that a proxy be provided. Accordingly, it is recommended that vendors enter into leases or licences of common property by passing resolutions prior to settlement (whilst they still control the Owners Corporation) and making the appropriate disclosure in the contract rather than relying upon special conditions imposing obligations on the purchaser after settlement.

- 2.6 If acting for a vendor, it is recommended that the contract discloses the lease or licence and includes special conditions, which allows the vendor to enter into the lease or licence before settlement, but also imposes an obligation on the purchaser after settlement. This gives the vendor maximum flexibility.
- 2.7 A long term lease can complicate issues such as responsibility for maintenance of the area, insurance, fees payable etc. These issues should be dealt with in a clear and transparent manner to avoid a subsequent claim by an aggrieved owner to VCAT.
- 2.8 From a purchaser's perspective, if there is a long term lease or licence disclosed which the developer is proposing to enter into or which the purchaser is required to consent to, it is important that the terms are clearly set out, including the requirement for maintenance, cleaning, insurance etc. The purchaser should not be required to pay costs or fees if they do not receive a benefit.
- 2.9 The purchaser should seek to negotiate on the terms of any lease or licence prior to signing a contract. Once the contract is executed, it is difficult to vary the documents.
- 2.10 A vendor and purchaser should be aware of section 130 of the *Owners Corporations Act* which provides that a lot owner must not use or neglect the common property or permit it to be used or neglected in a manner that is likely to cause damage or deterioration to the common property.

- 2.11 There is a detailed dispute resolution procedure set out in Part 10 of the *Owners Corporations Act* and in circumstances where a lease or long term licence is entered into and a subsequent lot owner does not believe that it adequately addresses the maintenance of the common property or has a general complaint, such owner may deem it appropriate to serve a complaint and then comply with the procedures set out in the Act. This may involve applying to VCAT.

3. FIRB REQUIREMENTS / DUTIES ON VENDORS, AGENTS AND LAWYERS

- 3.1 Foreign Investment Review Board (FIRB) requirements previously allowed vendors / developers who were carrying out a development of 10 or more dwellings to apply for advance approval to sell up to 50 per cent of new residences to foreign interests / investors. In circumstances where the pre-approval was granted, the vendor was required to provide a copy of their pre-approval letter to each prospective purchaser and to report all sales (i.e. both Australian and foreign) to FIRB on an annual basis until all the dwellings in the development had been sold. This is no longer available to vendors.

- 3.2 FIRB now allows vendors to sell 100% of an off the plan development to foreign investors where the development contains 100 or more lots. An application for advance off the plan approval will need to be submitted and if approved FIRB will issue a letter which states that the vendor can sell 100% of the new dwellings in the development to foreign persons on the conditions that:

- (a) The dwellings have not previously been sold;
- (b) The dwellings have not been occupied for more than 12 months;
- (c) The vendor provides a copy of the certificate to each prospective foreign purchaser; and
- (d) The vendor markets the dwellings locally as well as overseas.

The vendor will be required to provide details of all sales.

For smaller developments, purchasers must individually apply for FIRB approval.

- 3.3 The vendor will be required to provide monthly reports to FIRB and this should be carried out by the solicitor acting for the vendor. The information required usually includes:

- (a) The lot number of each sold dwelling;
 - (b) The consideration paid for the dwelling;
 - (c) The name and nationality of each purchaser;
 - (d) If the purchaser is a trust or company, the name of the ultimate shareholders and beneficiaries; and
 - (e) Documentation confirming ongoing local marketing for the coming 12 month reporting period.
- 3.4 If a vendor has not been granted advance approval, then the individual investor must seek approval. There are no restrictions on the number of dwellings in a new development which may be sold to foreign persons, on the proviso that the developer markets the dwellings locally and overseas.
- 3.5 If a purchaser is seeking to buy a property subject to FIRB approval, the contract should be conditional on the purchaser obtaining approval. If a purchaser enters into an unconditional contract which is not subject to FIRB approval, the following actions may be taken against them:
- (a) Two (2) years imprisonment and up to 500 penalty units or both (section 30(4) of the *Foreign Acquisitions and Takeovers Act 1975*).
 - (b) Divestment - if a foreign person has acquired an interest in Australian urban land and the Treasurer is satisfied that the acquisition is contrary to the national interest, the Treasurer may make an order directing that the person dispose of their interest within a specified period pursuant to section 21A(4) of the *Foreign Acquisitions and Takeovers Act*.
- 3.6 On 24 April 2010, FIRB released a press release titled "*Government tightens foreign investment rules for residential housing*". The press release indicated that there would be a new civil penalties regime of sanctions for purchasers, vendors and estate agents involved in a contravention of the *Foreign Acquisitions & Takeovers Act*. This Bill is expected to be put before parliament in October 2011.

- 3.7 Currently, there are no penalties in the *Foreign Acquisitions & Takeovers Act* for a vendor who sells property to a foreign person who has not obtained FIRB approval. Furthermore, section 38 of the *Foreign Acquisitions and Takeovers Act* states that an act is not invalidated by virtue of the fact that it constitutes an offence against the *Foreign Acquisitions and Takeovers Act 1975*. The implication is that a contract of sale is still binding on a purchaser even if it is in breach of the Act.
- 3.8 When acting for vendors, whilst the legislation has not been enacted, it is still recommended that where the vendor is aware that a purchaser is a foreign investor, the contract should be subject to FIRB approval being obtained.

4. COMMON AREA ISSUES – AVAILABILITY / WORKS / MAINTENANCE RESPONSIBILITY / FEES AND USE BY PARTIES

- 4.1 A development which contains common property will identify on the plan of subdivision which lots are members of the Owners Corporation. It is not necessary that all lots on the plan be members of the Owners Corporation because some lots may not use the common property.
- 4.2 Common property is an area that can be used by lot owners (unless it has been leased or licensed to a third party). The model rules for an Owners Corporation are set out in Schedule 2 of the *Owners Corporation Regulations 2007*. In particular:
- (a) Rule 3.1(1) provides that an owner or occupier of a lot must not obstruct the lawful use and enjoyment of the common property by any person entitled to use the common property.
 - (b) Rule 5.1 provides that an owner/occupier of a lot must take all reasonable steps to ensure that the guests of the owner or occupier do not behave in a manner likely to unreasonably interfere with the peaceful enjoyment of any other person entitled to use the common property.

The implication of rule 5.1 is that invitees and guests can also use the common area.

- 4.3 Lot owners may also lease their premises to third parties. Section 136 of the *Owners Corporations Act* provides that a lot owner who does not occupy his lot must give the occupier of the lot a copy of the rules of the Owners

Corporation. This ensures that the tenant is aware of the model rules in their use of the common property.

- 4.4 The Owners Corporation is responsible for the common property. Section 4 of the *Owners Corporations Act* provides that an Owners Corporation is required to manage and administer the common property. The Owners Corporation will set fees and levies and this is determined by the members at the Owners Corporation at meetings. If works are to be carried out to the common property including the provision of equipment or fitout works or to clean or maintain, the Owners Corporation will usually enter into agreement with the relevant service provider to carry out the works. This can be achieved pursuant to section 10 of the *Owners Corporations Act* which gives the Owners Corporation the ability to execute documents to enable it to carry out its functions, powers, rights and obligations.
- 4.5 The requirement to repair and maintain is imposed on the Owners Corporation pursuant to section 47 of the *Owners Corporations Act* which states that an Owners Corporation must repair and maintain a service in or relating to a lot that is for the benefit of more than one lot and the common property.
- 4.6 The carrying out of works by a third party is usually pursuant to an agreement entered into with the Owners Corporation. The Owners Corporation manager will be responsible for managing the works pursuant to the agreement. It is noted that pursuant to section 9 of the *Owners Corporations Act*, an Owners Corporation can also appoint or employ persons to assist the Owners Corporation in carrying out its functions.
- 4.7 The members of the Owners Corporation will be required to contribute fees to maintain the common area based on their lot liability. However, where one or more owners do not obtain a benefit, the lot entitlement may be amended pursuant to section 28(3) of the *Owners Corporations Act* to provide that such owner does not incur a lot liability for repairs, maintenance or other works that are undertaken by the Owners Corporation on common property which are wholly or substantially for the benefit of other lot owners.
- 4.8 Funding for Owners Corporation is provided by the members of the Owners Corporation as follows:
 - (a) An Owners Corporation may levy fees to cover general administration, maintenance and repairs, insurance and other recurrent obligations of

the Owners Corporation (pursuant to section 23 of the *Owners Corporations Act*);

- (b) Levy special fees and charges designated to cover extraordinary items of expenditure – this may include painting the common property or specific works that are required (pursuant to section 24 of the *Owners Corporations Act*).

4.9 If there is a prescribed Owners Corporation, then there must be a maintenance plan prepared for the property which is prepared by the Owners Corporation and which contains certain information as set out in section 37 of the *Owners Corporations Act*. This includes major capital items anticipated to require repair or replacement within the next ten (10) years, the condition of such items and estimated cost of the repair. A prescribed Owners Corporation is an Owners Corporation that levies annual fees in excess of \$200,000.00 in a financial year and an Owners Corporation that consists of more than 100 lots.

5. OWNERS CORPORATION ISSUES WITH SHORT STAY OCCUPIERS – REFERENCE NSW CASES

5.1 There are issues in respect to short term letting of apartments in development sites which contain common property. The issues which Owners Corporation managers have been required to address include:

- (a) Resident's quiet enjoyment;
- (b) Security costs;
- (c) Cleaning costs;
- (d) Additional maintenance costs for damage caused;
- (e) Unauthorised use of gymnasiums or pools (if relevant);

5.2 The issue has been addressed in detail in the New South Wales case of *187 Kent Pty Ltd v Council of the City of Sydney [2007] NSWLEC 382 (27/6/2007)*. This case identified the difference in the activity patterns and behaviour of short and long term residents and the responsibility to control and resolve any issues of conflict between the users and occupants falls on the managing agency.

It was noted that a short term resident does not have a long term interest in the amenity or maintenance of the building and if there is a greater frequency of short term occupants, it may be potentially disruptive for long term occupants.

It was also noted that noise is often not contained to the apartment and may reverberate into a common property area (i.e. corridor). The disturbances could relate to matters such as noise from adjoining apartments and conversations in common areas.

- 5.3 The case highlights that a long term occupant may be more likely to promote a quieter and more peaceful amenity than a short term occupant. The reason is that they may regard it as their home rather than a temporary place of residence. Long term occupants are more likely to be less tolerant of disturbances because they have a greater feeling of ownership.
- 5.4 There have been two other NSW decisions which indirectly considered the issue, being:
- (a) *Borg v The Owners of Strata Plan 64425 [2010] NSWDC 203 (10/6/2010)* - it was noted that at some developments sites, there are a category of people that come for the purpose of a short term holiday.
 - (b) *Council of the City of Sydney v Oaks Hotels and resorts (NSW) No.2 Pty Ltd [2010] NSWLEC 181 (30/9/10)* – It was noted that the Strata / Owners Corporation can assign a caretaker to undertake dealings concerning short stay occupiers

Whilst the short term lease issue was not addressed in detail in either case, the cases highlight the importance of the manager of the Owners Corporation having a plan to address short term occupiers.

- 5.5 The *Owners Corporations Act* imposes duties on lot owners pursuant to both the Act and the model rules, however it does not adequately address short term leases or licences.
- 5.6 Some Owners Corporation managers actively seek to manage this issue, whilst others are more reactive. Owners Corporation managers should consider passing special resolutions or creating special rules which requires

that a lease, sublease, licence etc will not be for a period of less than a set period.

5.7 If purchasers enter into an off the plan contract which contains a short term lease commencing at settlement, they should be advised of:

- (a) the impact that this may have on the common property; and
- (b) the position that the managing owners corporation may take if a number of residents within a development take the view that the short term lease does not benefit the apartment site / common property.

6. EVEREST AND CLIFFORD CASES

The description below of Clifford and Everest's case does not seek to set out in detail what occurred because these cases have been addressed in previous presentations. Instead they seek to identify the key issues for off the plan transactions.

Clifford & Anor v Solid Investments Australia Pty Ltd [2009] VSC 223

6.1 Facts: Solid Investments was the owner of a property on Eastern Beach Road, Geelong that intended to build a multi-storey residential apartment complex. Clifford purchased one apartment in his own right on 31 July 2006 and one apartment with a third party on 2 August 2006. The contracts contained a condition which allowed the vendor to extend the time for registration of the plan of subdivision if registration was likely to be delayed as a result of various events (i.e. authorities, lock outs, strikes, riots, acts of God etc).

The time for registration of the plan of subdivision was 30 months from the day of sale. The contract contained the usual clause allowing the vendor to increase the time for registration. The vendor served notices on 3 separate occasions extending the time. The purchasers served a rescission notice challenging the right of the vendor to extend the date for registration of the plan of subdivision.

6.2 Summary findings: Bongiorno J held that the provision in the contract which allowed the vendor to extend the date for registration of the plan of subdivision contravened section 9AE(2) of the *Sale of Land Act 1962* (which deals with the time period for registration of the plan of subdivision).

Accordingly, the purchaser was entitled to rescind and therefore obtain the return of their deposit.

A purchaser who signs an off the plan contract should have certain knowledge that if the plan of subdivision is not registered within a set identified period, he or she should have an unfettered right to rescind. Furthermore the term "specified period" in section 9AE(2) means a period that is fixed, definite and certain.

The decision was affirmed on appeal.

6.3 Practical implications:

- (a) Vendors should not rely on a condition in the contract which gives them the right to extend;
- (b) In preparing contracts, the time period for registration should be longer than anticipated to give the vendors certainty in the event that there are unforeseen delays.

Everest Project Developments Pty Ltd v Mendoza & Ors [2008] VSC 366

6.4 Facts: Everest Project Developments (the developer) carried out a development at 200 Spencer Street and 55 Queen Street comprising the construction of residential units on the land. During October 2004 to April 2007, Everest sold off the plan lots to a range of purchasers including the defendants. The defendants purchased 33 residential units. Everest was placed into liquidation in May 2007 and in September 2007, Becton Property Group took control of Everest. Building works had commenced.

There were a range of contracts entered into with different circumstances. A key example was the Defendant provided a deposit through a third party of \$500 and when the 10% bank guarantee / deposit bond was provided, Everest subsequently returned the \$500.00.

The Defendants served notices of rescission alleging breaches of sections 9AA and 9AB of the *Sale of Land Act*. Everest disputed the validity of the notices and issued proceedings. The Defendants claimed that they could rescind pursuant to section 9AE which provides that if a vendor breaches section 9AA or 9AB of the *Sale of Land Act*, the purchaser may rescind.

The definition of Deposit Bond in the Contract was an unconditional undertaking by an insurer in a form acceptable to the vendor to pay money to the vendor. The special condition of the contract of sale provided that if the purchaser breaches the special condition the vendor may claim on the deposit bond and if the vendor exercises its right, the amount paid by the insurer may be dealt with by the vendor under general condition 6(3)(b) of Table A.

- 6.5 Summary findings: The definition of deposit in the contract of sale is in breach of s.9AA(1)(i) which requires that the moneys be paid to a legal practitioner, conveyancer or licensed estate agent acting for the vendor or into a special purpose account in the joint name of the purchaser and vendor.

The contract did not clearly state that if the vendor called on the bank guarantee / deposit bond, the proceeds could only be paid to the vendor's solicitors or agent.

In the judgement, J Hargrave noted that the clear purpose of sections 9AA and 9AH of the *Sale of Land Act* is the protection of purchasers of lots on unregistered plans of subdivision. In particular, the provisions of sections 9AA(1), 9AA(2) and 9AE(1) of the *Sale of Land Act* are intended to ensure that deposits paid by purchasers are protected. Therefore the vendor must ensure that the deposit bond structure (noting that this includes the receipt and retention of the initial payments pending delivery of the deposit bonds together with the deposit bond structure) must strictly comply with the *Sale of Land Act* in absolute terms.

The relevant contract was voidable at the option of the purchaser.

- 6.6 Practical implications:

- (a) Bank Guarantee must be in favour of the vendor's solicitors
- (b) If an initial deposit is paid by the purchaser (i.e. \$1,000), make sure it is paid in compliance with the *Sale of Land Act*.
- (c) Ensure that if an initial deposit is paid with a bank guarantee / deposit bond to be subsequently provided, the amount of such bank guarantee / deposit bond is 10% less the initial deposit paid. If the full 10% deposit is provided, it is important that the cash component is returned contemporaneous with the provision of the bank guarantee

so that the Vendor's solicitor is not holding more than 10% at any point in time.

7. RECENT OFF THE PLAN CONTRACT - D'SOUZA'S CASE

D'Souza v Wedgewood Road Hallam No.1 Pty Ltd [2010] FCA 765

- 7.1 Facts: D'Souza and Hitesh Batt entered into a contract to purchase lot 10 at 50 Wedgewood Road, Hallam for \$1,011,690.00 pursuant to a contract of sale dated 19 February 2008. The contract was a prescribed contract within the meaning of section 9AA(1) of the *Sale of Land Act*.

The dispute between the parties concerned the terms of the contract and whether the contract disclosed that fill was required to achieve the designated design level. There was a north-south cross section of the site which showed the need for fill of up to 10m on the Lot which was omitted from the contract.

The purchaser's solicitors alleged that contrary to section 9AB of the *Sale of Land Act*, the contract did not give any details of works that would affect the surface level of the lot (nor did the vendors statement). Section 9AB of the *Sale of Land Act* deals with works affecting the natural surface level of the land in the lot

- 7.2 Summary findings: Gordon J noted in paragraph 76 of her judgement that "*Section 9AB does not prescribe how disclosure of the detail of any works affecting the natural surface level of the land is to be made..... For present purposes it is sufficient to note that there is a duty to disclose works affecting the natural surface of the land.*" The question was whether the contract of sale disclosed that fill was required on lot 10 and was the disclosure adequately conveyed.

It was determined that a reading of the pad plan and the contract of sale showed that fill was required. Although the contract omitted the north-south cross section which would have made it abundantly clear, the failure to include it did not alter what was disclosed in the contract.

It was noted that the vendor could not and did not identify with any specificity what additional "details of the works" would have been necessary. However the purchaser was an experienced businessman and it was determined that the failure to disclose fill was not a misdescription so

substantial and material that it may be supposed that the purchasers would not have entered into the contract.

7.3 Practical implications

- (a) The experience of the purchaser is an important factor.
- (b) Practitioners should review plans carefully to determine that there has been adequate disclosure of works to the natural surface of land.

8. BANK GUARANTEE CLAUSES

8.1 Prior to *Everest's* case, the standard bank guarantee clause provided that the bank guarantee must be in favour of the vendor. The clause would usually address the following items:

- (a) The type of bank guarantee or deposit bond that the vendor would accept;
- (b) The time period for provision of the bank guarantee (i.e 14 days after signing the contract of sale);
- (c) The circumstances in which the vendor could draw on the bank guarantee;
- (d) The expiry date on the bank guarantee; and
- (e) The requirement to obtain a further bank guarantee, if the original bank guarantee expired or was due to expire.

8.2 The issues have been complicated by *Everest* and *Clifford* cases. In particular, the bank guarantee or deposit bond has to be in favour of the lawyer acting for the vendor and not in favour of the vendor. Certain deposit bond institutions are unable to do this and accordingly, they should not be accepted by the vendor.

8.3 Additionally, as a result of *Clifford's* case, the time period for registration of a plan of subdivision has often been increased in new Contacts. However, some banks will not issue a bank guarantee for a period of say 60 months. In those circumstances, the contract needs to address the requirement for obtaining a

new bank guarantee and this should occur at least 30 days prior to the first bank guarantee expiring.

8.4 It is recommended that the condition dealing with the bank guarantee addresses the following:

- (a) The bank guarantee should be in favour of the vendor's solicitors;
- (b) The vendor shall not be deemed to have accepted a bank guarantee merely by reason of its receipt by the vendor, the vendor's solicitor or its agent, because they are often presented in an unacceptable form.
- (c) The condition needs to set out how the vendor's solicitor can call on the funds in circumstances where the purchaser breaches the contract.

8.5 Vendor's solicitors should be wary of bank guarantees which are linked to the time frame in the contract. i.e. if you have a 48 month period to register the plan, the plan may register in the 48th month and settle 2 weeks later and the bank guarantee may expire in the interim.

8.6 Consideration for contracts where you are holding a bank guarantee in favour of the vendor (i.e you obtained the bank guarantee prior to the Everest decision or did not deal with it immediately thereafter) needs to be had. There are two ways which solicitors have sought to address this:

- (a) Terminate the contract and enter into a new contract on the same date for the same amount, obtain a new bank guarantee and return the original bank guarantee contemporaneous with receipt of the new bank guarantee. The purchaser will have two issues with this - stamp duty implications (because the building may now be partly constructed) and the cost on obtaining a new bank guarantee;
- (b) Ask the purchaser to obtain a new bank guarantee and return the original bank guarantee contemporaneous with the provision of the new bank guarantee. The clause in the contract which deals with calling on the bank guarantee will need to be amended to address this which will involve preparing a deed of variation or an exchange of letters which amends the contract. Again, a purchaser may not agree based on the cost implication in providing a new bank guarantee and this may need to be addressed by negotiation.

9. EXTENDING DATE FOR REGISTRATION OF THE PLAN

- 9.1 Some contracts of sale still include the right for vendors to extend the date for registration of the plan of subdivision. It does not in my view impact on the validity or enforceability of the contract except to say that a vendor would have difficulty in relying on it as a result of *Clifford's* case. However, such contracts should contain a severability clause which allows the clause to be severed without impacting on the balance of the contract.
- 9.2 Mortgagees (when reviewing a contract of sale for a developer) may require the removal of the clause which deals with the extension of registration date clause. Developers, in contrast, may wish to retain it because they take the view that the law may change and it kept the vendors options open.
- 9.3 In preparing contracts, and as noted above, the safest position is not to include a clause which allows a vendor to extend the date for registration of the plan, but instead the vendor should give themselves a considerably longer period than they anticipate to complete the development, to register the plan. The downside is that this may impact on the marketing of the development because a purchaser may not wish to purchase an off the plan development in which the time period for registration of the plan is 60 months.

This paper is not to be relied upon as legal advice