



T I S H E R L I N E R & C O .
L A W Y E R S

***PROPERTY PROFILE GROUP
LEGAL PRESENTATION***

by

***JONATHAN TISHER
TISHER LINER & CO.
ACCREDITED PROPERTY LAW SPECIALIST***



Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

TABLE OF CONTENTS

Topic	Page No.
1. Section 55 of the Estate Agents Act	1
2. Estate Agents Authorities.....	2
3. Litigation.....	3
4. Advertising.....	4
5. Contract & Vendor's Statement Disclosure.....	5
6. Off the Plan Issues	7
7. Everest & Clifford.....	9
8. Cooling Off Provisions	11
9. GST	12
10.Excess Land & Defects	13

1. SECTION 55 ESTATE AGENTS ACT, THE RESTRICTIONS IMPOSED AND DEALING WITH CONSUMER AFFAIRS

1.1 Section 55 of the Estate Agents Act

Section 55 of the Estate Agents Act prevents estate agents (directly or indirectly) from purchasing a property or business which the agency is commissioned to sell. This means that family members, companies and trusts that the agency is associated with cannot purchase a property which the agency is commissioned to sell unless they comply with the consent procedure set out below.

The parties which are deemed to be beneficially interested pursuant to Section 55 include:

- The estate agent or an employee of the estate agent;
- The spouse, domestic partner, parent, brother, sister or child of the estate agent; and
- A corporation, association of persons, firm or partnership carrying on business for profit of which the estate agent or spouse or the domestic partner, parent, brother, sister or child of the estate agent is a member.

The penalties for breaching this provision are as follows:

- Consumer Affairs will report in their annual statement that the agency has breached Section 55;
- Monetary penalty of 120 penalty units. The current value of a penalty unit is \$119.45;
- Potentially transfer the title back to the vendor and/or account for profits;
- Repay any commission;
- Any other penalty imposed by the Court.

1.2 Obtaining Consent

It is noted that a spouse, domestic partner, parent, brother, sister or child can in some circumstances obtain pre-approval to purchase real estate.

The previous legal position (prior to 1 January 2011) was that a purchaser was required to submit an application (signed by the vendor consenting to the sale) together with a valuation to the Director of Consumer Affairs and consent was required in writing prior to bidding at an auction or making a private offer.

The legislation was amended on 1 January 2011. The amended provisions require that:

- the vendor must agree to the purchase by signing a “Notice of consent to purchaser of property or business by a prohibited person” before the purchaser signs a contract;
- The form must be signed by the licensed estate agent;
- The vendor’s lawyer, conveyancer or accountant must provide their written consent to the sale.

The form provides that the vendor is strongly advised to obtain independent advice if they are unsure of the fair market value of the property.

Once documents are signed, they must be sent to Consumer Affairs (if the purchaser buys the property) but this can occur within seven (7) days of the contract being signed by the vendor. Consumer Affairs will now acknowledge receipt of the documents but will not formally consent.

In the case of an auction, the vendor may withdraw from the sale within seventy-two (72) hours of signing the contract by giving written notice to the purchaser. If this right of withdrawal is exercised, the purchaser is not liable to the vendor or liable to pay commission or outgoings for the sale.

The legislation raises a number of concerns regarding the consent procedure and is currently being redrafted.

2. DRAFTING, INTERPRETING AND EXECUTING ESTATE AGENTS AUTHORITIES (INCLUDING OFF THE PLAN AUTHORITIES)

If an authority is not completed accurately, there can be issues in respect to enforceability, particularly if the matter becomes litigious in respect to claiming outgoings / advertising expenses or commission.

It is important to address the following:

- 2.1 Insert the address of the property, how the commission is calculated (with an example), the exclusive authority and continuing authority period and the advertising expenses (set out in an unambiguous manner).
- 2.2 The name of the vendor and if more than one all names should be inserted onto the authority. If there are two vendors, both vendors should sign the authority, otherwise you may have an issue of enforceability against only one vendor.

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

- 2.3 Make sure the authority contains the usual general conditions and not just the particulars, because the particulars refer to the general conditions.
- 2.4 On an off the plan sale authority, the document often provides that 50% of the commission is payable on exchange and 50% on either a specified date or at settlement. From a vendor's perspective, "exchange" should be identified as exchange of an unconditional contract and payment of a 10% deposit. The term settlement should be clearly defined because if a specific date is inserted, it usually will not be the actual settlement date.
- 2.5 On a normal sale, an agent is entitled to retain its commission from the deposit. On an off the plan sale, the commission cannot be paid from the deposit. This is because of Section 9AA of the Sale of Land Act which provides that the deposit must be held on behalf of the vendor and purchaser until settlement. Accordingly, some off the plan authorities contain a charging provision which gives the agent the right to lodge a caveat. This can be important when there are considerable commissions to be paid and the agent wants some form of security particularly where an agent sells a number of lots in a development and the vendor elects not to proceed with the development and does not have the funds to pay the commission. A charging provision would grant the agent the right to lodge a caveat over the property.
- 2.6 From a vendor's perspective, they will not want a caveat to be lodged as it may hold up registration of the plan of subdivision. Most contracts prohibit a purchaser from lodging a caveat during the period of the contract, so they will argue, why should an agent do so. They may seek to offer some alternative form of security.
- 2.7 If the vendor is a company and there are off the plan sales, many agents obtain a personal guarantee from the director of the vendor to further secure their interest.

3. LITIGATION FOR REIMBURSEMENT OF COMMISSION / ADVERTISING EXPENSES

Litigation may be required where a vendor does not pay the commission and/or advertising expenses to the agent.

The types of issues that occur are as follows:

- 3.1 An authority has not been executed by the vendor (or if there is more than one vendor, by both vendors). You cannot enforce and seek payment of commission and outgoings incurred if an authority has not been signed pursuant to Section 49A of the Estate Agents Act.
- 3.2 In respect to advertising, a common issue is where the property does not sell and the vendor subsequently claims that the agent did not act appropriately and in accordance with the instructions provided and therefore they are not prepared to pay the expenses.
- 3.3 It is important that all advertising is signed off by the vendor. Copies should be sent to the vendor and they should execute below the advertisement to confirm their

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

consent to the form of advertisement. If there is an error in the advertisement, the vendor will inevitably refuse to pay for it, so make sure it is approved in writing. In addition, the amount of the advertising should be identified and accepted. Any variations to the marketing campaign should be consented to and retained in a file.

- 3.4 It is important to keep a comprehensive file on all sales because when the matter becomes litigious, this information is called as evidence and as the matter is likely to be heard 12 to 18 months after the issue was first raised, detailed notes are very important.
- 3.5 A case is often determined by a Magistrate or VCAT member over the course of 2-3 hours. The credibility of the witness is largely dependent on how they present, their evidence and the manner in which they kept and retained their file.

4. ISSUES CONCERNING INCONSISTENCIES IN ADVERTISING AND DISCLOSURE IN CONTRACTS

- 4.1 It is not uncommon to have a scenario where what is advertised or represented by an agent is not consistent with what is stated in the contract. This can lead to the vendor or the agent being sued.
- 4.2 An agent that acts as a conduit and supplies information from a vendor to a purchaser does not have the same duty of care as a vendor, but can still be held to be liable.
- 4.3 Examples in respect to inconsistencies include:
- advertising a lot with a car park space on title when the car park space is a licence from the Owners Corporation (and is not on title). A purchaser could claim that this affects the value of the land and they would not have paid as much had they been aware of it.
 - a property being advertised at an estimated price with no mention of GST and the Contract states that it is a “plus GST” transaction. If the auctioneer does not make this clear at the commencement of the auction, there is the potential that a purchaser who is then required to pay GST may bring a claim against the vendor and the agent for misleading and deceptive conduct.
 - the advertising of the agents at the open for inspection states that certain chattels will remain and the contract specifically excludes those chattels.
 - the property is advertised as being subject to a Lease pursuant to a long term lease, but on settlement, the tenant has vacated and vacant possession is provided.
 - the property is advertised as vacant possession, but there is a lease and the tenant refuses to vacate until the Lease ends. In that circumstance, a purchaser has the right not to settle.

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

- a property is advertised as being available for development but contains a restrictive covenant and is clearly not available for redevelopment until the covenant is removed which is a very difficult process.
 - The title boundaries are not consistent with the fence boundaries.
- 4.4 If you become aware of the issue prior to the contract being signed, it is important to do the following:
- It would be prudent to ring those people who have expressed an interest in the property and advise them of the changed position.
 - If the property is being sold at auction, the auctioneer should state at the commencement of the auction that the initial advertising / representation was incorrect and has since been amended.
 - Insert a condition into the contract which seeks to address the issue. Taking the car park title issue as the example, the condition should provide that the purchaser has been made aware that the car park space is not on title but is held under a licence agreement and the purchaser releases the vendor from any claim or demand and cannot delay settlement.
 - The agent should obtain a separate acknowledgement signed by the purchaser. Again, taking the car park as the example, it should provide that the purchaser has been made aware prior to signing the contract that the car park space is not on title but is held under a licence agreement and they acknowledge that they have no claim against the agent.
- 4.5 If you become aware of the issue after the contract has been signed, the position is largely dependent on how the purchaser reacts. It may require negotiation on the price or an aggressive stance in which the vendor / agent claims that it has no impact on the purchaser. It must be analysed on a case by case basis.

5. CONTRACT AND VENDOR'S STATEMENT DISCLOSURE

A Contract of Sale contains generic conditions which deal with the payment of deposit, adjustments, default, passing of title etc. Most lawyers adopt the standard form of contract prescribed by the Estate Agents (Contracts) Regulations 2008.

The contract requires that you complete the particulars of sale page. This essentially includes the vendor and purchaser details and their representatives, the purchase price, deposit and balance, settlement details and GST. The contract also contains provision for special conditions. If special conditions are to be attached, the words "special conditions" must be completed or they are not binding on the parties.

The Vendor's Statement must comply with Section 32 of the Sale of Land Act 1962 and disclose all the relevant information set out in section 32. If not, a purchaser may be able to end the contract prior to settlement by serving a notice of rescission for non-disclosure on the vendor.

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: tisher@tisherliner.com.au web: www.tisherliner.com.au

The information is set out in Section 32 (and the list below is not exhaustive), but identifies some of the key items:

- 5.1 Copy of the title;
- 5.2 Details of any mortgage over the land which is to be discharged before the purchaser becomes entitled to possession;
- 5.3 Description of any easement, covenant or other restriction affecting the land. This includes both registered or unregistered easements or covenants;
- 5.4 In the case of land to which a planning instrument applies:
 - The name of the planning instrument;
 - The name of the responsible authority;
 - The zoning of the land;
 - Where a planning instrument prohibits the construction of a dwelling outside the metropolitan area, notice of such prohibition;
 - Specific notice to purchasers which include:
 - (i) *“the use to which you propose to put the property may be prohibited by the planning or building controls applying to the locality or may require the consent or permit of the municipal council or other reasonable authority it is in your interest to undertake a proper investigation of the permitted land use before you commit yourself to buy”*
 - (ii) *“the property may be located in an area where commercial agriculture production activity may affect your enjoyment of the property. It is therefore in your interest to undertake an investigation of the possible amenity and other impacts from nearby properties and the agricultural practices and processes conducted there”*
 - (iii) *“you may be liable to pay a growth areas infrastructure contribution (GAIC) when you purchase this property. The instrument of transfer cannot be lodged for registration with the Registrar of Titles until the contribution is paid in full or an exemption from, or reduction of, the whole or part of the liability to pay the contribution is granted and any remainder of the contribution is paid or there has been a deferral of the whole or part of the liability to pay the contribution. The transfer may also be exempted from a growth areas infrastructure contribution in certain situations. It is in your interest to obtain advice as to any potential liability before you commit yourself to buy.”*
 - Details of the rates, taxes and charges or other outgoings affecting the land and a statement that the total amount does not exceed a particular sum;

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

- Particulars of any notice, order, declaration, report or recommendation of a public authority;
- A list of the services, electricity, gas, water, sewerage and telephone etc and whether they are connected or not. It is particularly important to check if water is connected and whether it is connected by sewer or septic etc;
- If the land contains a subdivision with an Owner's Corporation, particulars of any payment or non-payment of any sum by the registered proprietor in respect to the maintenance fund (together with the Owners Corporation Certificate and insurance);
- Particulars of the current land use restriction notice in respect to the Agricultural and Veterinary Chemicals (Control of Use) Act 1992;
- If there is no access to the property by road, a statement that there is no such access;
- A warning that purchasers should check with the appropriate authorities as to the availability of, and the cost of providing any essential services not connected to the land.

The vendor must sign the Vendors Statement prior to it being provided to the purchaser.

5.5 An important point to note is that if there is a development in the nearby area and the vendor has been given notice of it or notice of an application, this should be disclosed as well and any other notice which the vendor has received from a public authority or government department affecting the land.

5.6 There are issues which go beyond section 32 and which relate to misleading and deceptive conduct. If a vendor or an agent is aware of an issue and does not disclose it, depending on the issue, the purchaser may be able to either rescind the contract or make a claim for damages. It is noted that silence can constitute misleading and deceptive conduct. Examples of misleading and deceptive conduct may include:

- Tenant is substantially in arrears of rent;
- Proper boundaries;
- Contamination reports which are not disclosed;
- GST position.

6. OFF THE PLAN ISSUES AND DEVELOPMENTS IN THE LAW

- 6.1 There has been a change in the law relating to off the plan contracts, essentially to the warnings which are required on contracts.
- 6.2 The Consumer Affairs Legislation Amendment (Reform) Act 2010 (Vic) 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.
- 6.3 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.
- 6.4 The amendments which will take effect include the following:

6.4.1 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*.

Currently, section 9AA(2) of the *Sale of Land Act* 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)."*

The amendments will delete section 9AA(2)(b) (i.e. the special purpose account) and section 9AA(3) of the *Sale of Land Act*.

6.4.2 Prominent warnings

It will now be a requirement pursuant to section 9AA(1A) that on an off the plan contract, the front page of the contract contains a prominent warning to the purchaser stating:

TISHER LINER & CO.

- 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.
- 6.5 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.
- 6.6 Practitioners and agents should monitor and keep themselves updated on the amendments to the legislation.
- 6.7 There are a number of implications of the amendments including:
- Solicitors or agents should not include a covering page with a picture of the development as this may be deemed the front page of the contract.
 - Any contracts that have been submitted prior to 1 September 2011 but which have not been signed should be recalled and amended.
 - Solicitors need to be able to clearly identify monies held in trust as part of a particular transaction.
- 6.8 Submissions have been made by the Property Law Committee to reduce the penalty for non-compliance, noting that a purchaser can rescind at any point until settlement. The Committee was of the view that the period to rescind should be a limited period of say 3 months. No response has been provided at this stage in respect to whether the legislation will be redrafted.

7. EVEREST & CLIFFORD (OFF THE PLAN CASES)

There have been two landmark cases which changed the face of off the plan Contracts. These are known as Clifford and Everest cases.

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

- 7.1 Facts: Solid Investments was the owner of a property on Eastern Beach Road, Geelong that intended to build a multi-storey residential apartment complex on 31 July 2006. Clifford purchased an apartment in his own right.

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

The contract 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 etc).

The time for registration of the plan of subdivision was 30 months from the day of sale. The contract contained a 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.

- 7.2 Findings: A 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 should have an unfettered right to rescind. The term “specified period” in section 9AE(2) means a period that is fixed, definite and certain.

- 7.3 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

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

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.

The Defendants served notices of rescission alleging breaches of sections 9AA and 9AB of the *Sale of Land Act*.

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

7.6 Practical implications:

- (a) Bank Guarantee must be in favour of the vendor's solicitors
- (b) Ensure that if an initial deposit is paid with a bank guarantee to be subsequently provided, the amount of such bank guarantee is 10% less the initial deposit paid.
- (c) 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.

8. COOLING OFF PROVISIONS

- 8.1 The basic principle is that once a contract has been entered into it is binding, but in certain circumstances purchasers have the ability to cool off.
- 8.2 The qualifications for cooling off are that it must be residential property and the cooling off must occur within three (3) clear business days of signing pursuant to Section 31 of the Sale of Land Act.
- 8.3 There are some exclusions for relying on the cooling off period which are as follows:
 - If you purchase the property at auction or three (3) clear business days before or after an auction.
 - If the parties have previously entered into a Contract in relation to the property.
 - If the purchaser is an estate agent or a company.
 - If the purchaser has received independent legal advice before signing the contract.
- 8.4 In determining what clear business days means, the day of signing is not counted and the right may be exercised until the end of the third business day, commencing on the first business day after signing. So if a contract is signed on a Saturday, the first day for calculating the period is a Monday and the purchaser would have until the Wednesday to cool off.
- 8.5 The commencement of time is when the purchaser signs the contract so if a vendor signs a vendors statement and a purchaser then signs a contract and vendors statement on a Monday and the vendor only countersigns the contract on the Wednesday, the purchaser's three day period is from when they signed (i.e. the Monday not the Wednesday).

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

8.6 There has been submissions lodged which would allow the cooling off period to continue to apply even if independent legal advice was obtained. This is still under consideration.

9. GST IN RESPECT TO VACANT LAND, RESIDENTIAL AND COMMERCIAL PROPERTIES, SALE OF A GOING CONCERN AND THE MARGIN SCHEME

9.1 As a general rule GST is not payable on the sale of residential property.

9.2 GST can only be payable if the following four threshold requirements are met:

- Consideration (which is the payment of money);
- It is in Australia;
- The Vendor must be a registered entity or required to be registered; and
- The supply must be part of an enterprise.

9.3 The question as to what an enterprise is, is essentially activities conducted on a regular recurring basis with a view to making a profit.

9.4 Assuming the threshold requirements are satisfied:

- GST is payable on the sale of vacant land. The land is usually sold on a “plus GST” basis. However, many vendors are not registered or required to be registered and therefore no GST would be payable in that circumstance.
- GST is payable on the sale of new residential land or where substantial renovations have been carried out. The question of what constitutes a substantial renovation is a difficult one and is considered on a case by case basis. There are tax rulings which identify what is likely to be considered a “substantial renovation”. If there is any uncertainty, a private ruling should be obtained.
- On the sale of commercial properties, GST is payable. However, if there is a lease, the property can be sold as a going concern so that no GST is payable. In this circumstance, the purchaser must be registered for GST in order to be granted the sale of a going concern exemption. If a purchaser nominates under a contract, the nominated purchaser must sign a deed agreeing for the sale to be considered a sale of a going concern and must be registered.

If you are selling property which has a number of tenants and one tenant vacates prior to settlement, if the vendor actively markets the property, it is likely to be able to be sold as a going concern. In circumstances where only part of the property is tenanted and the vendor is not actively marketing, there can be a partial apportionment for GST.

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

- Mixed supply – If you are selling a commercial property with an associated residential component, GST will be calculated having regard to the proportionate commercial v residential component.
- 9.5 The use of the margin scheme means that less GST is payable by a purchaser as a result of the calculation if the property is sold on a plus GST basis. There are two scenarios:
- The property was acquired prior to 1 July 2000. In this case, a value certified by a valuer as of 1 July 2000 is compared with the sale price and GST is paid on the difference, rather than on the full sale price.
 - The property was acquired after 1 July 2000. The same exercise occurs, except that the 1 July 2000 value is replaced with the acquisition cost.
- 9.6 It is important to note that you cannot claim a GST credit if the margin scheme is adopted.

10. ISSUES RELATING TO EXCESS LAND OR DEFECTS IN THE PROPERTY AND NON-DISCLOSURE

- 10.1 If a purchaser becomes aware prior to settlement that there is a misdescription of the title / boundaries, there is a question of whether it justifies the purchaser terminating the contract. If the misdescription is material and affects the contract in a manner that it may be reasonable to state that the purchaser would not have entered into the contract if they had been aware of the misdescription, then they can avoid the contract. This has become known as the rule in *Flight v Booth (1834) 131 ER 1160* and has been adopted in a range of subsequent cases.
- 10.2 As a general rule of thumb, a discrepancy in measurements which effects 5% of the area is regarded as material. However, it should be noted that it does depend on what part of the land is affected and the importance of such area. There have been cases where more than 5% has not been considered material and likewise that less than 5% has been considered material. It needs to be considered on a case by case basis.
- 10.3 The issue often comes to light when a survey is carried out. If the issue relates to excess land and the purchaser becomes aware of the issue prior to settlement, the purchaser may be entitled (once they become the owner) to make an adverse possession claim. To do so, the purchaser should investigate prior to settling the position of the fence and should seek from the vendor at settlement a Deed of Assignment of Possessory Rights (or a special condition in the Contract which addresses this) and a Statutory Declaration from the vendor attesting to the period of time that the fence has been in that particular position.
- 10.4 The question of defects in the building on the property (as opposed to the land) which a purchaser is made aware of prior to settlement can be difficult to address. Inevitably a purchaser will seek to delay settlement until the defect is rectified,

TISHER LINER & CO.

Jonathan Tisher | Partner

Level 2, 333 Queen Street, Melbourne 3000

Ph: (03) 8600 9333 Fax: (03) 9670 6359

Email: jtisher@tisherliner.com.au web: www.tisherliner.com.au

whereas the vendor will claim that either the defect was there as of the day of sale or that the defect is minor.

- 10.5 If the defect was there as of the day of sale, a purchaser cannot delay settlement or seek compensation because the vendor is only required to provide the property in the same state it was in as of the day of sale, subject to fair wear and tear. By way of an example, if you buy a property and the dishwasher does not work as of the day of sale, you cannot seek a new dishwasher.
- 10.6 The purchaser should also be aware that if it is a minor issue, it will often not give them the right to prevent settlement from proceeding and instead they should settle and place the vendor on notice prior to settlement of the issue and bring a claim subsequent to settlement. If a vendor is aggressive and a purchaser seeks to hold up settlement, they may serve a notice of rescission and seek interest and the purchaser would be forced to settle or run the risk on losing the deposit and having a claim made against them.

This information is provided for information and discussion purposes only. It is not to be relied upon nor construed as legal advice.