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THE VICTORIAN STANDARD FORM CONTRACT REVISITED

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Property Law (Vic)

The Victoria Standard Form Contract Revisited

a presentation by

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The Standard Contract for Sale Revisited

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Pursuant to Section 99 of the *Estate Agents Act* 1980, a new Contract for the Sale of Land in Victoria was introduced on 28th September 2008. It replaced the long standing contract note and contract of sale.

It is contained in the *Estate Agents (Contracts) Regulations* 2008, as Form 1 in the Schedule. Form 2 is the general conditions of sale of real estate. Form 3 is a Contract for Sale of Business.

The new contract is far clearer, and no longer requires you to look at Table A of the *Transfer of Land Act* 1958. No longer are there requisitions on title. No longer do we need to say 'and/or nominee'. (See *Fast and Friendly,* 2008 Contract for Sale of Land, by Russell Cocks, LIJ October 2008 page 40.)

Builder warranty insurance must be provided; there is a clarity concerning loss or damage before settlement; and there is a dispute resolution process into which a maximum sum of $5,000 can be paid.

There has been a fair bit of 'tweaking' and, to the consternation of Russell Cocks, many contracts, especially those prepared by solicitors, have special conditions. (See *Happy Anniversary* by Russell Cocks, LIJ November 2009 page 77. See *Legislation Renovation,* LIJ October 2010 at page 81.)

The contract must be used by estate agents, solicitors, or conveyancers, and the Law Institute of Victoria has recently made some amendments to the form. See *Property: Contract of Sale Tweaked January/February 2012* 86 (1/2) LIJ, page 84.

The changes are not great, but take into account the *Personal Property Securities Act* 2009, which has now come into force. After some delay, it eventually came into effect on 1 February 2012.

There is little judicial authority on the new contract of sale, which is probably for two reasons. First, the choice of jurisdiction in which you can commence proceedings is wide, and I will come to that later, and second, there is the attitude of the Courts that relatively simple words, especially in relation to Section 32 Statements, should not become unduly encrusted with authority. See Charles and Callaway JJA at *Fifty Eight Highwire Pty Ltd v Cohen and Another* (1996) 2 VR 64 at 77, adopted by Beach J in *Paterson v Batroney and Another* (2000) VSC 313 at 17.

For a recent discussion of Section 32 and Notices, see: *Peluso v Safi* (2011) VSC 504, on appeal from the Magistrates' Court.

Let me take you to some recent property issues.

Notices

Consider this. You have a 'subject to finance' clause, and finance has to be approved by today. You don't get finance, so your solicitor writes to the vendors, and says:

Our client has not had finance approved at this stage.
We seek an extension of one month to 2 April 2012. We understand the delay relates to the actual distribution to our client of shares under an estate, which will form security for the borrowing.
Should you have any queries please contact (the purchaser's solicitors).
In the event that an extension is not agreed to, you may treat this letter as written notice ending the contract.

It is a fact that the letter was not responded to, and that no extension of the approval date was agreed to.

Do you think that is sufficiently clear to end the contract, given that finance was not obtained by 2nd April 2012, and there was no reply to the letter?

The Court of Appeal rejected the Appellant's submission that a reasonable person would have understood the letter as ending the contract if, within a reasonable time, an extension was not granted.

See *Umbers v Kelson* (2010) VSCA 227 at 13 and 41, per Hansen JA.

This illustrates the need to draw a default notice under Clause 25 of Form 1 very carefully.

The Purchaser who moves in early

The contract clauses have not been the subject of great legal scrutiny. Rather, it is the surrounding circumstances, or circumstances where people do not use the contract, or make representations prior to the contract, or allow people to move in before settlement date, that have given rise to problems.

Usually, a prospective purchaser who moves in before settlement date, and then fails to complete the contract, has no right to be there. In *Williams v Rampino* (2002) VSC 284 the Defendant survived an attempt to have her deliver up land, in circumstances where she had purchased it, paid a small deposit of just over one percent, but did not pay the settlement sum on the due date. Justice Gillard, while suspecting that she couldn't find the money, dismissed the application because the notice wasn't valid. On 15th August 2002, Justice Nettle in *Williams v Rampino* (2002) VSC 343 had no such qualms, and ordered that she leave the property. So, with an originating motion issued on 2nd August 2002, orders were made that within fourteen days the Plaintiff recover the land.

In circumstances where there is a contract of sale, such applications are relatively straightforward. But if you are foolish enough to advise a vendor client to allow the

purchaser in early, it is important to ensure that you specify the terms on which they go in, and it is wise to get a licence agreement. It seems to be a common problem at the moment, especially with builders.

For an example of where it at all went wrong, have a look at a recent decision of Justice Kyrou in *Byrne v Ritchie* (2009) VSC 114. His Honour was not prepared to grant an order to the Plaintiff that land be recovered to it, because there was a serious dispute about what constituted the contract and who were the parties to it. The Plaintiffs asserted that it was an oral contract, and the Defendants asserted that it was a document titled 'Heads of Agreement' – because they were not estate agents they could draw up their own document. His Honour took the view that the procedure in order 53 is appropriate where it is readily apparent that the Defendant does not have a current right to remain on the relevant land, including where any dispute as to the existence of such a right can promptly and fairly be determined summarily.

(It is worth noting that in circumstances where a life tenant has died and the relatives or children remain, the estate has a similar right pursuant to order 53. But is a right that should be exercised with care.)

Part IV of the Property Law Act 1958

This gives VCAT the exclusive power, except in limited circumstances (section 234C of the *Property Law Act*), to order the sale of jointly owned property, including land. VCAT has power to make any order it thinks fit to ensure a just and fair sale or division of land (section 228(1) of the *Property Law Act*). Joint ownership includes land alleged to be held on trust by the registered proprietor of the land. See *Garnett v Jessop* [2012] VCAT 156.

Severing a Joint Tenancy

There has been a raft of recent cases in which Courts have shown a willingness to sever joint tenancies, particularly in circumstances where the registered proprietors were not

aware of the niceties of property law. For a very recent example, see: *Stassinopoulos v Stassinopoulos* [2011] VSC 647 at 57.

Commencing proceedings

So, negotiations have broken down, settlement date has passed, and you either wish to rescind or enforce the contract. Where do you go?

There are lots of places.

First, Section 107 of *The Fair Trading Act Victoria* provides that a 'consumer and trader dispute' is a dispute or claim arising between a possible purchaser of goods or services and a supplier or possible supplier of goods and services, in relation to a supply or possible supply of goods and services. (Section 107(1))

Section 3(2) of the *Fair Trading Act* incorporates the definitions in Australian Consumer Law. See *Unfairness Out,* by Andrew Felkel, LIJ November 2011 page 42. Supply includes, in relation to goods, a sale, exchange, lease, hire or hire purchase. Although not beyond doubt, given the previous legislative regime which included an interest in land as a supply of goods, it is possible that VCAT would have jurisdiction to deal with a dispute under a contract of sale. This has not yet been tested.

The advantage of VCAT is that it will provide a prompt and efficient method of resolving disputes, although costs do not necessarily follow the event unless the requirements of Division 8 of the *Victorian Civil Administrative Tribunal Act* are complied with, in particular the requirement of settlement offers set out in sections 113 and 114. That then means that the costs jurisdiction is enlivened pursuant to section 115 of the Act.

Of course you can go to either the commercial list in the Supreme Court or the expedited commercial list in the County Court. By and large, the intention of both Courts is to resolve disputes as promptly as possible. Quite often, getting a quick hearing can depend on the circumstances at the time, but for an example of something that rocketed through the commercial list, see *Austin Bloodstock Pty Ltd v Massey* (2011) VSC 421, in which

proceedings were commenced on about 21st July, a directions hearing was held on 29th July, the hearing was set on the 17th and 18th August, and the decision delivered on 31st August – all done within the space of six weeks – by Pagone J in the Commercial Court.

The County Court is expeditious, and the expedited commercial list is ruled over by Judge Anderson, who dispatches business efficiently and promptly.

