1. Typically the making of a contract for the sale of land in Victoria is relatively straightforward. The estate agent acting for the vendor will, in compliance with the Estate Agents Act s. 53A(1)(a), use –

(a) the standard form of contract permitted by the Regulations made under that Act, being the form comprising Form 1 and Form 2 in the Schedule to the Estate Agents (Contracts) Regulations 2008 (or a Form to like effect: s. 53 of the Interpretation of Legislation Act 1984); or

(b) a standard form contract approved by the Legal Services Board or a professional association, being in practice the Contract of Sale of Real Estate co-published by the LIV and the Real Estate Institute of Victoria; or

(c) a contract prepared by an Australian legal practitioner or (within the meaning of the Conveyancers Act 2006) a licensee.

These three types of contract will contain many identical terms.

2. However this process may break down at various stages due either to factors of a general contract law nature or peculiar to contracts of sale of land. These issues are considered below largely through the medium of recently decided Victorian Supreme Court cases, as follows -

A. General formation of contract problems. This covers:

   General –

   *Hall v Busst* (1960) 104 CLR 206 at 222

   Offer and acceptance -

   *Peluso v Safi* [2011] VSC 504

Whether there is a binding agreement pre-dating the formal contract -

*Update Pty Ltd v Commissioner of State Revenue (Taxation).*

*Agius v Sage* [1999] VSC 100.

Whether the contract is void for uncertainty –

*Agius v Sage.*

Instruments Act s. 126 (“s. 126”), part performance and estoppel –

*Agius v Sage.*

Whether there are terms outside the written contract -
Extent of a solicitor’s authority to contract –
Zhang v VP302 Spv & Ors [2009] NSWSC 73.
The importance of careful drafting -
Bisognin & Anor v Hera Project Pty Ltd [2016] VSC 75

B. Section 32 Statements –
ZX Group Pty Ltd v LPD Corporation Pty Ltd [2013] VSC 542.
Vouzas v Bleake House Pty Ltd [2013] VSC 534.

C. Terms contracts -
Legislative amendment.
Landmark Property Enterprise Pty Ltd v Monash Property Developments Pty Ltd [2015] VSC 266.

D. Sale off the plan -
Besser v Alma Homes Pty Ltd [2012] VSC 460.
Lockwood v PSP Investments Pty Ltd [2013] VSC 10.
Harofam Pty Ltd v Scherman [2013] VSCA 104.
Bisognin & Anor v Hera Project Pty Ltd [2016] VSC 75.

E. Owner – Builders.

F. Pre-existing fact situations caught by contractual conditions, which might have been avoided –
Inability to give vacant possession - Qin v Smith (No. 2) [2013] VSC 476.
The vendor who has previously sold the land - ZX Group Pty Ltd v LPD Corporation Pty Ltd [2013] VSC 542.
Payment by unusual means - Douglas v Simons Builders P/L and Anor [2015] VSC 118.
A purchaser confused about price - Duoedge Pty Ltd v Leong & Anor [2013] VSC 36.
Subject to finance - Putt v Perfect Builders Pty Ltd [2013] VSC 442;
O’Toole v Kent [2015] VSC 470.
Encroachments - Pamamull v Albrizzi (Sales) Pty Ltd (No 2) [2011] VSCA 260; Rise Home Loans Pty Ltd v Dickinson & Anor [2010] VSC 29.

G. Special Conditions – those to be beware of and conditions to be noted.
Unless otherwise stated a reference to a section number is to that section in the Sale of Land Act 1962.

A. GENERAL FORMATION OF CONTRACT PROBLEMS.

General.

3. In Hall v Busst (1960) 104 CLR 206 at 222 Fullagar J stated -

“… a contract for the sale of "land and improvements." In such a case there cannot, I think, be held to be a binding contract unless the three essential elements are the subjects of concluded agreement. The three essential elements are the parties, the subject matter and the price. If, but only if, these are fixed with certainty, the law will supply the rest”.

Offer and acceptance.

4. Peluso v Safi [2011] VSC 504 primarily illustrates lapse of offer. On 22 February 2010 Safi executed a form of contract for purchase of land from Peluso. The document had the following features –

(a) The following deletion –

“This offer will lapse unless accepted within [blank] clear business days (three days if none specified)”

(b) It required an initial deposit upon signing (which, incidentally, Osborn J held must mean signing by both parties [9]), the payment of the balance of the deposit on 9 March 2010, and $160,740 payable at settlement on 23 April 2010.

(c) A handwritten special condition stated that General Condition 14 applied, ie as to sale subject to finance, that the lender was as “an approved financial institution”, that the loan amount was “$142,900.00 (not less than)” and that the loan approval date was 8 March 2010. General Condition 14 inter alia provided in substance that the purchaser could end the contract if the loan was not approved by the approval date and the purchaser gave notice of termination within two clear business days thereafter.

On 17 March 2010 the contract was signed on behalf of Peluso and such signature was, it appeared, communicated to Mr Safi. Safi could not obtain finance, the contract was terminated, a Magistrate held that Peluso was not entitled to retain the balance of deposit, and Peluso appealed.
5. Osborn J held ([11], [13]) that by 17 March it was no longer open to vendor to accept the offer because –

(a) The offer comprised in the documents signed by the purchaser comprehended sequential obligations intended to commence with the conclusion of the contract by acceptance of the offer before 9 March 2010;

(b) Of fundamental uncertainty concerning what, if any, was the obligation of the purchaser to pay the deposit if the contract was not concluded before that date;

(c) As at 17 March there was also a fundamental uncertainty as to the purchaser's rights, if any, under the condition as to finance, because the two days notice provision had already expired. The vendor's delay thus deprived the purchaser of any opportunity to take advantage of the special condition. Accordingly Peluso did not accept the offer on the terms on which Safi made it;

(d) Where no date for lapse is specified in an offer, it is deemed to lapse unless accepted within a reasonable time. In this case that time could not extend beyond a date when Safi had a reasonable opportunity to exercise an unqualified right under General Condition 14, which date was necessarily some time prior to the approval date of 8 March;

(e) In summary the offer lapsed because effluxion of time rendered it incapable of acceptance, alternatively because by the time of the purported acceptance performance of the contract was impossible in accordance with the terms of the offer.

Further, Safi had not affirmed the contract by after 17 March 2010 saying “I will go ahead if I can get finance” – this was not an affirmation of the strict terms of the contract. [15]

This case is further mentioned under the heading of Section 32 Statements.

For completeness, if an offer is stated to be open for a particular time it cannot be accepted outside that time, such purported acceptance being a counter-offer, and an offer stated to be open for a particular time can be revoked within that time: J. W. Carter, E. Peden and G. J. Tolhurst, Contract Law in Australia, 5th ed, 2007, [3-42], [3-54].

Whether there is a binding agreement predating the formal contract.
Whether the contract is void for uncertainty.
Instruments Act s. 126, part performance and estoppel.

6. *Update Pty Ltd v Commissioner of State Revenue (Taxation).* This litigation turned on the exact date on which a contract was made and raised other issues relevant to the creation and enforceability of contracts. This was significant because under legislation establishing the Growth Areas Infrastructure Contribution a dutiable transaction existed unless “a contract relating to that transaction was entered into before the relevant day” this being an “excluded event” (Planning and Environment Act s. 201RB(d)(iii)). The relevant day was 2 December 2008. Relevant to the date on which a contract is made are the following well known propositions in *Masters v Cameron* (1954) 91 CLR 353 at 360 (paragraphing added by the writer for clarity) -

“Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases.

It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.

Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.

Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common. …

[361] Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own: … The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document … or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed. …

[362] The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in
order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape: …

Nor is any formula, such as "subject to contract", so intractable as always and necessarily to produce that result: … But … This being the natural meaning of "subject to contract", "subject to the preparation of a formal contract", and expressions [363] of similar import, … such words prima facie create an overriding condition, so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract. … “

Further, in Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622 at 628 McLelland J enunciated a fourth class of case, namely -

“... one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms”.

7. In Update the registered proprietors engaged an agent (“Cowper”) to sell their land. The directors of the applicant (“Update”) were Mondous and Canzoneri,. In June 2008 the directors offered $1.2 m. accompanied inter alia by an unsigned contract document prepared by the vendors in anticipation of an offer of $1.4 m., which figure the directors replaced with $1.2 m. together with other largely consequential amendments. The offer was rejected.

In late November 2008 Mondous offered to purchase the land for $1.4 m. with a six month settlement. Cowper communicated this offer to the vendors, who accepted it, and on 1 December 2008 Cowper orally relayed this to Mondous and they arranged the contract to be signed the following day. Cowper then altered the June document to reflect this agreement. On 2 December Mondous signed the contract and gave Cowper a cheque for $10,000, categorised by Cowper as being to show the vendor that the purchaser was serious about securing the property for $1.4 m. At this meeting Cowper wrote and Mondous initialled “2/12/2008” in the “date of sale” section in the Particulars of Sale in substitution for “the earlier of the date of this contract or the acceptance date of any prior contract note”.

Subsequently: the deposit was paid; on 9 December the vendors signed the contract and signed contracts were exchanged; Update was nominated as the purchaser and the purchase was settled.
8. Update was assessed for duty on the ground that there was no contract before 2 December 2008. The assessment was referred to VCAT (Update Pty Ltd v Commissioner of State Revenue (Taxation) [2012] VCAT 1166) and -

(a) Mondous and Cowper gave evidence that they both intended to be contractually bound once the acceptance of the offer was communicated by Cowper to Mondous, ie on 1 December. Accordingly Update submitted that the contract was entered into on 1 December 2008 because this acceptance of which Cowper informed Mondous was on the basis of a complete written document containing all the necessary terms for a binding contract, which therefore fell within the first category of Masters v Cameron;

(b) The Commissioner argued that when the conduct of the parties was considered objectively they did not intend to be bound until the contract was signed by both parties, and so the case fell into the third Masters v Cameron category. The Commissioner relied on the statement by the High Court in Allen v Carbone (1975) 132 CLR 528 at 532 that -

“the usual method of selling real estate in New South Wales is by means of the signing and exchange of contracts in the form approved by the Real Estate Institute of New South Wales”.

and on later authority to similar effect including that stating that the New South Wales proposition had been accepted in Victoria. Senior Member Davis accepted this [59] and found that even if an oral contract was made on 1 December 2008 it was discharged by the subsequent written contract [75].

9. On application for leave to appeal Davies J held that the Tribunal had erred in construing the legislation as only applying to written contracts enforceable under s. 126 predating 2 December 2008: it had not considered whether the parties intended to be bound by those terms immediately upon reaching agreement on 1 December 2008 (Update Pty Ltd v Commissioner of State Revenue [2013] VSC 122). Her Honour noted that the legislation did not impose the requirement that the contract must be enforceable at the time it was made. At [20] Davies J stated -

“… parties can make an oral contract for the sale of land that is binding on them in the sense that they have a concluded agreement, albeit that the contract is not enforceable because of non-compliance with s 126 … and s 53 [of the Property Law Act] … Although the contract may be unenforceable for want of writing, there is still a contract and the contract is not void.”
Her Honour further held that, even if the subsequent written contract had discharged an earlier oral contract, this did not negate the existence of the oral contract as at 1 December [28].

10. On the remission of the case to VCAT (Update Pty Ltd v Commissioner of State Revenue (Review and Regulation) (Correction) [2013] VCAT 1627) Update lost again. Senior Member Davis held that objectively speaking neither the purchaser nor the vendors through their agent intended to be bound until the contract was signed by at least the purchaser but in all probability by both vendors and purchaser [46]. There was no intention to create legal relations on 1 December.

11. Update unsuccessfully sought leave to appeal: Update Pty Ltd v Commissioner of State Revenue [2014] VSC 187. Sloss J noted that there was a “well-established contractual practice relating to land” which suggested that the parties did not intend to create legal relations on 1 December, namely that the parties were conducting their negotiations on the basis of a written standard form contract providing for signing and counter-signing [51]. In the subsequent words of Hayne and Nettle JJ in Update Pty Ltd v Commissioner of State Revenue [2015] HCASL 33:

“[3] The principal issue before Sloss J, and the Court of Appeal, was whether Senior Member Davis had erred in law in applying a presumption that parties to a contract of sale of land intend the contract to come into existence only upon the exchange of signed written counterparts.”

Both parties acknowledged that in Victoria there was such a rebuttable presumption [54]. Sloss J held that Update was required and had failed to lead clear evidence that the parties intended to contract by another method. The Tribunal had also not wrongly taken into account subjective evidence when reaching a conclusion about an objective matter, being the intention to create legal relations [64], [65].

12. Update unsuccessfully sought leave to appeal to the Court of Appeal: Update Pty Ltd (ACN 106 132 245) v Commissioner of State Revenue [2014] VSCA 218. The court in substance stated that while it may have been preferable for Sloss J not to use the word “presumption” [36], her Honour’s use of this word was simply
another way of describing a ‘normal’ or usual conveyancing practice of which the parties knew and which was correctly said to raise an inference that they intended to contract only when they had exchanged signed counterparts of the contract [35]. Eventually Hayne and Nettle JJ dismissed an application for special leave to appeal to the High Court, stating after referring to the “presumption” (above) –

“[5] The difficulty for the applicant, however, … is that neither Senior Member Davis nor Sloss J treated the putative "presumption" as conclusive of an intention to be bound before the exchange of parts, or as preventing the applicant from demonstrating that the parties intended to be bound before the exchange of parts”.

13. The older case of Agius v Sage [1999] VSC 100 is a rare example of a contract of sale of land in the first Masters v Cameron category. It also raises issues of voidness for uncertainty, s. 126, part performance and estoppel.

Sage was the controller of the Merchant Pacific Group of companies which included the second defendant ("the Developer"). Under an uncompleted contract the Developer was purchasing land for development as an apartment block. On 5 February 1997 Sage and Agius orally agreed on Agius purchasing a particular penthouse (at that time merely a stratum of air space off-the-plan) and three undesigned parking lots for $500,000. They then shook hands on the deal. Then (in the words of Agius’ testimony) -

"… [Sage] … said, ‘You bastard you have got it. You have got the quickest million dollars I have ever given away’, and then I [Agius] said to him, I said ‘Let's put it down in writing’. He said, ‘Norm, when I shake hands, I have got a deal. Its a deal'. I [Agius] said to him, I said, 'When I shake hands, I want it in writing', … "

Sage then wrote on a paper serviette or placemat (they were in an empty restaurant) words including recording his agreement as managing director of the Merchant Pacific Group to the sale to Agius’ company of the penthouse for $500,000 and to other terms. Sage dated and signed this “document”, it was witnessed by the restaurant manager, but Agius did not sign. Two copies of a project brochure were initialled on two pages, one by Agius alone and the other by both men. There was no discussion that the agreement be subject to the execution of formal documents.
14. On 18 February both men executed a redraft of this Memorandum in which inter alia Sage stated “This acceptance and acknowledgement, including the enclosed $100.00, is accepted by me and my company in confirmation of my hand-written document dated 4th February, 1997”. On 20 February Agius received from Merchant Pacific a set of draft contract documents. On 13 March solicitors for the vendor forwarded engrossed contract documents for execution by the nominated purchaser which however showed only two car parking spaces. On 14 March Agius executed the contract documents and stood by awaiting exchange of parts, which never occurred.
Later came what the purchaser alleged was “the September agreement” consisting of letters between solicitors from 27 August and to 12 September 1997 culminating in a statement by Agius’ solicitors that a particular offer was accepted and requesting preparation of an appropriate deed. No deed was ever executed.
Agius and associated parties sought specific performance of one or more of the agreements or appropriate alternative relief.

15. Byrne J materially held –

1. At the meeting on 5 February 2007 the two men by their handshake concluded the deal and intended to enter into legal relations. They believed that they had agreed upon the sale and purchase of the penthouse upon the terms in the hand-written memorandum but it was within their contemplation that the agreement would be formalised in greater detail. In reaching this result his Honour said that he inter alia took judicial notice that a transaction of this kind would normally be implemented by an exchange of contracts and may have to satisfy the requirements of the Sale of Land Act 1962. [49] – [50], [62]

2. The essential and critical terms of the bargain had been agreed and accordingly the agreement was not void for uncertainty: In particular: although there was no express agreement on the date of completion, including of payment of the price, there was an implied term that this occur within a reasonable time; and lack of identification of the Developer as vendor was not fatal as it was known to be a company within Sage’s group. [51], [53], [57]

3. To comply with s. 126 the note or memorandum must contain all or all of the essential terms of the contract. The handwritten document of 5 February was a note or memorandum, not a contractual document, but did not comply with
s. 126 because it omitted the correct name of the vendor, any reference to the three car parks, or to the requirement that contracts be prepared and executed including details of the penthouse to be constructed. [69]

4. The document dated 18 February was also a note or memorandum, not a contractual document, and did not comply with s. 126 for the same reasons and also because it contained terms not included in the oral agreement of 5 February. [73]

5. Non-compliance with s. 126 could be cured by part performance of the agreement: if the acts of the plaintiffs were carried out for the purpose and in the course of performing the contract and were unequivocally and in their own nature referable to some agreement such as that relied on; and the purchaser changed its position on the faith of the agreement. However, although steps had been taken to implement the 5 February agreement they were equally referable to an expectation on the part of the purchaser that a contract would in the future be entered into, and so did not satisfy s. 126. [74] – [76]

6. But "reduced to writing estoppel", founded on the decision of Tadgell J in Collin v Holden [1989] VR 510, was established. In Collin, when a Supreme Court proceeding concerning land was called on for hearing, counsel informed the judge that it had been settled and the case was accordingly adjourned by consent. Counsel signed terms of settlement, one term involving the conveyance of land. Subsequently the defendant resiled from the settlement and the plaintiff sought to enforce it although counsel who signed the terms had not been authorised in writing as required by s. 126. Tadgell J held that: the conduct of the defendant carried with it a representation that he would not insist on his statutory right to require, as a prerequisite to the enforceability of the terms of settlement to be drawn up, either that they should be signed by him or that his counsel should be authorised in writing as required by s. 126; on the faith of this conduct the plaintiff was induced not to proceed with the hearing in the current court sittings; and that the defendant intended that she should be so induced. The defendant was accordingly estopped from insisting upon his entitlement to rely upon s. 126. Byrne J noted that since Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, this and similar estoppels may fall under the heading of equitable estoppel [82].
Byrne J accordingly held that the conduct of the Developer and its solicitors caused Agius to expect that documents would be executed to record formally what was previously agreed; the nominee purchaser acted to its detriment in reliance upon this by holding funds ready and incurring legal costs; it would accordingly be unconscionable for the Developer to avoid the consequences of its agreement of 5 February by reliance upon s. 126. [83], [85]

7. The alternative argument of the purchaser, namely that there was a concluded agreement in September 1997 contained in the solicitors’ letters, was not established: the intention of the negotiators as disclosed in the correspondence was that no concluded agreement should be made unless and until these contracts were exchanged, ie the third category of Masters v Cameron. Any such agreement would also have failed to comply with s. 126 which non-compliance would not have been overcome by any estoppel. [92] – [93]

8. The purchaser accordingly obtained an award of statutory damages in lieu of specific performance of the agreement to sell the penthouse and three carparks for $500,000. [99]

**Whether there are terms outside the written contract.**

16. If there is a written contract it is difficult to establish the existence of terms outside the contract. Thus in Sandri v O’Driscoll & Anor [2014] VSCA 88 the court stated at [40] -

“Courts have been and remain reluctant to displace the terms of a contract entered into between competent, legally advised parties by relying on what has been said in pre-contractual negotiations”.

Similarly, in Amanatidis v Syed & Anor [2009] VSC 350, where the written contract recorded an agreement by two vendors to transfer land in twelve certificates of title, half residential units and half carparking spaces on a plan of subdivision, the purchaser failed to establish an entitlement to six individual contracts each with a residential unit and carparking space. This entitlement was based on an alleged oral agreement shortly before the contract was signed. Hansen J found that this not only failed on the evidence but also quoted the following statement in Maybury v Atlantic Union Oil Co Ltd - :
“Once an agreement is made in writing it is treated, unless the parties are shown otherwise to intend, as the full expression of their obligations. If it is established that the writing was intended to contain only part of a fuller agreement it may be otherwise. ... But it may be established that an entirely separate agreement was made by the parties. One of them may give a collateral promise in consideration of the other entering into the principal agreement. But if such a collateral agreement is to have effect as a contract it must be consistent with the provisions of the main agreement, the making of which by the other party provides the consideration. If the promise sought to modify, control or restrict the principal agreement it would detract from the very consideration which is alleged to support the promise.”

**Extent of a solicitor’s authority to contract.**

17. Under s. 126 a solicitor lawfully authorised in writing may sign a contract or a memorandum or note thereof if lawfully authorised in writing by the person to be charged. *Zhang v VP302 Spv & Ors* [2009] NSWSC 73 deals with a related issue. At a meeting between the plaintiffs, who were prospective purchasers, and their solicitor he on instructions made handwritten changes to special conditions in a draft contract supplied by the vendor’s solicitors. The plaintiffs signed the execution page and left the contract with the solicitor, who had their actual authority to exchange contracts incorporating the amended terms. However, further amendments were made at the suggestion of the vendor’s solicitor, of which the plaintiffs were unaware, and in this state contracts were exchanged. White J found –

1. Unless the plaintiffs gave the solicitor authority to agree on their behalf to any reasonable modifications proposed by the vendor, the solicitor did not have actual authority to bind them to the modifications, and the vendor was not on notice of this. [27], [30]

2. However the solicitor did have ostensible authority to bind them by an exchange of a contract signed by them. [34], [35], [40], [41], [51]

Accordingly the plaintiffs were bound, but nonetheless the contract was rescinded because of certain other representations amounting to misleading or deceptive conduct.

**The importance of careful drafting**

18. *Bisognin & Anor v Hera Project Pty Ltd* [2016] VSC 75 is more fully dealt with below under sales off-the-plan. However, a drafting point also arose. Following a dispute arising out of a contract of sale the purchaser and vendors entered into terms of settlement which provided that the parties agreed to make a new contract
which included the term that if the plan of subdivision was not registered by 25 August 2015 either party may by notice to the other party end the contract. However this was subsequently rendered in Special Condition 8 of the new contract as -

“If the said Plan of Subdivision is not registered by 25th August 2015, then the parties may by notice in writing to each other end this Contract of Sale”.

Sloss J held that the literal meaning of these words was that termination of the new contract could take place only if both parties agreed. However, there was a reasonable basis for apprehension that the literal construction of these words might not necessarily reflect the presumed intention of the parties and that the true construction, which her Honour adopted, was as stated in the terms of settlement. If necessary her Honour would also have rectified the special condition on the grounds of mutual mistake. [163], [167], [185]

B. Section 32 Statements

19. From 1 October 2014 the vendor is no longer required to attach the section 32 statement to the contract (s. 32(1)) but the LPLC recommends that this nonetheless occur to make it easier to prove that the purchaser received a signed section 32 statement. The detailed nature of ss. 32A – 32O make it impractical to go through each provision one by one. Rather, recent cases will briefly be touched on. Helpful advice is contained in an LPLC Column “Old Claims, New Laws” at p. 72 of the October 2014 LIJ.

20. There are three basic categories of case being those where s. 32: is breached and the breach is inexcusable, or; is breached but the breach is excused, or; is not breached. Examples in order of each category are:

(a) *Peluso v Safi* [2011] VSC 504 (dealt with above under offer and acceptance) where the contract (if there was one) was made in early 2010. The section 32 statement purported to satisfy the then provision requiring evidence of right or power to sell in a vendor who was not the registered proprietor (s. 32(3)(b)) (now s. 32I(c)) by attaching a copy contract under which Peluso was purchaser from a particular company due for completion on 7 September 2009. Osborn J expressed the view that prima facie this did not comply and that as that company was now in liquidation this breach was not excusable. [6], [21]
In *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542 the only breach of s. 32, among many alleged, was non-disclosure of a land tax charge registered on title approximately four weeks before the contract. The vendor was excused under s. 32(7) (now s. 32K(4)) because: the charge only shortly predated the contract and the Vendor's Statement did fully disclose land tax arrears, noted the vendor’s responsibility to pay them, and the vendor left legal aspects of the sale to its solicitor; the vendor acted reasonably because its director believed that the arrears were insignificant, because they were to be paid out of settlement monies, and any negligence by its solicitor was not to be attributed to the client; the vendor ought fairly to be excused; and the purchaser was in substantially as good a position as if all the relevant provisions of s. 32 had been complied with, chiefly because the vendor had before the date of settlement of the contract undertaken to the Commissioner of State Revenue to collect the outstanding land tax at the settlement of the sale. Williams J held it to be irrelevant whether the vendor had acted dishonestly in a matter extraneous to s. 32;

(a) *Vouzas v Bleake House Pty Ltd* [2013] VSC 534 which concerned whether the requirement to provide “a description of any easement, covenant or other similar restriction affecting the land … “ (now s. 32C(a)) covered certain tenancy matters. The tenant was Collingwood Football Club which was in layman’s terms taking actions to cease to be lessee. Macaulay J. inclined to the view that a lease had to be disclosed, but found it unnecessary to decide the question because in any event it was disclosed that the lessee was Collingwood and the vendor was not required to supply information about a conditional agreement to assign or assignment of a lease or the consent by the owner thereto. His Honour would if necessary have excused the vendor under s. 32(7).

**C. TERMS CONTRACTS**

21. The central provision, s. 29A, was the subject of legislative amendment which came into force on 22 April 2015. As amended, including showing 2015 amendments in strikethrough and **bold**, it reads –

“**29A What is a terms contract?**
(1) For the purposes of this Act a contract is a terms contract if it is an executory contract for the sale and purchase of any land under which the purchaser is—

(a) obliged to make 2 or more payments (other than a deposit or final payment) to the vendor after the execution of the contract and before the purchaser is entitled to a conveyance or transfer of the land; or

(b) entitled to possession or occupation of the land or to the receipt of rents and profits before the purchaser becomes entitled to a conveyance or transfer of the land.

(1A) A payment made by a purchaser under a contract for the sale of land following a default by the purchaser or agreed to by the purchaser and vendor in anticipation of a default by the purchaser does not count as a payment for the purpose of subsection (1)(a).

(2) In subsection (1)—

**deposit** means a payment made to the vendor or to a person on behalf of the vendor before the purchaser becomes entitled to possession or to the receipt of rents and profits under the contract;

**deposit** means any part of the purchase price that the contract (including the contract as varied by written agreement between the parties after initial execution) specifies as being a deposit and provides must be paid, whether by one or more payments, within a specified period, not exceeding 60 days, after the execution of the contract;

**final payment** means a payment on the making of which the purchaser becomes entitled to a conveyance or transfer of the land.”

22. The altered definition of “deposit” is attributable to *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd* (2011) 35 VR 1 which held that a payment of $1 m. over a year after the contract was made was part of the “deposit” on the ground that it was expressly so termed in a deed of variation of the contract. Under the amended s. 29A this $1 m. would no longer be a deposit because of the 60 days bar.

23. *Landmark Property Enterprise Pty Ltd v Monash Property Developments Pty Ltd* [2015] VSC 266 illustrates how a contract can be turned into a terms contract. However in the writer’s opinion it would now be decided differently because of s. 29A(1A) enacted in 2015. Nonetheless, the case is instructive on the care which should be taken not to unwittingly create a terms contract, on general contractual interpretation, and on the interpretation of the statutory provisions related to mortgaged land sold under terms contract. Relevant statutory provisions were: s. 29M which provided that if land is subject to a mortgage the mortgagor must not sell the land under a terms contract unless (a) the mortgage related only to that land and unless certain other provisions in s. 29M requiring disclosure of the
mortgage and certain other matters were satisfied; s. 29N which empowered a purchaser to avoid a contract entered into in contravention of section 29M at any time before completion; s. 29O which provided that s. 29M did not apply if the contract contained particular provisions as to the discharge of the mortgage; s. 29P which provided that the vendor under a terms contract must not mortgage the land.

24. In *Landmark* the first defendant ("Monash") was the registered proprietor of land ("the property") subject to a mortgage which also covered other land. On 21 July 2010 Monash and the plaintiff ("Landmark") entered into a contract under which the property was sold for $2,380,000, with a 10% deposit payable as to $100,000 on signing and the balance of deposit on 26 August 2010, and the balance of price payable on the later of 12 October 2010 or within 7 days of approval of a subdivision permit by the Council. The deposit was paid. On 12 October 2010, and as a consequence of the issue of a subdivision permit on 6 October 2010, Monash stipulated the completion date as 19 October 2010.

The completion date was then extended by agreement between solicitors as follows (including, in inverted commas, expressions used by Croft J):

- on 13 October to 27 October 2010;
- by agreement on about 27 or 28 October, extension to 30 November 2010 with interest payable;
- “the third variation” — 10% of the purchase price payable on 26 November 2010 in consideration for an extension to 4 January 2011 ("the first interim payment");
- “the fourth variation” — 10% of the purchase price payable on 5 January 2011 in consideration for an extension to 2 February 2011 ("the second interim payment").

There were then two later variations including provision for two further interim payments. Landmark paid Monash various sums. The contract was never completed and Monash took action whereby it asserted that the contract was terminated. Landmark asserted that the contract was a voidable terms contract.

25. General Condition 23.1 provided:

"If this is a “terms contract” as defined in the Sale of Land Act 1962:

(a) any mortgage affecting the land sold must 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 6(1) and 6(2) of the Sale of Land Act 1962; and

(b) the deposit and all other money payable under the contract (other than any money payable in excess of the amount required to discharge the mortgage) must"
be paid to a legal practitioner or conveyance or a licensed estate agent to be applied in or towards discharging the mortgage”.

This was the provision required by s. 29O.

26. Croft J held –

1. The post contractual arrangements between the parties with respect to payments constituted variations of the contract, not mere indulgences by the vendor. The solicitors’ correspondence evidenced promises by both parties, in the case of the vendor for extension met by agreement by the purchaser to pay part of the purchase price and interest.

2. (Because this contract predated the 2015 statutory amendments Monash was able to argue that these payments were merely part payments of the “deposit” as then defined in Sale of Land Act). Croft J, however, interpreted that definition to mean a payment in “earnest” as long-understood in conveyancing transactions or (as in Ottedin) a payment or payments identified by the parties in a deed or contract as a “deposit”. Accordingly (even before the 2015 amendments) the part payments were of the purchase price not additional payments by way of deposit. The correspondence indicated the parties’ intention to characterise the payments as part payment of the balance of the purchase price; they were not merely payments at large without any thought or expression of intention as to their characterisation. Accordingly under s 29A(1)(a) the contract, as varied, became a terms contract at the time of and because of the fourth variation.

3. Being a terms contract, the contract did not comply with any of s. 29M(a) – (d). The purchaser accordingly could avoid the contract under s 29N(a) and this made the contract a nullity retrospectively from the date of avoidance. The fact that the vendor had purported to terminate the contract did not affect this. General Condition 23 was inapplicable because the agreement in the third and fourth variations that the additional payments would be released to the vendor had the effect of abrogating General Condition 23.1 insofar as it had required money to be applied in or towards discharging the mortgage.

4. Section 29P did not apply because the mortgage was not created after the contract had been entered into.
The court reserved for future determination the question of whether there was a lack of evidence of an authority from the clients to the solicitors.

D. SALE OFF THE PLAN

27. There have been a number of cases in recent years about the ability of a purchaser to rescind a contract for sale off-the-plan culminating in *Bisognin & Anor v Hera Project Pty Ltd* [2016] VSC 75 decided in the last fortnight. Sections 9AC and 9AE are central and cases below are grouped under each.

28. Section 9AC broadly enables a purchaser to rescind a contract for sale of a lot in an unregistered plan of subdivision if there is a proposed amendment to the plan (of which the purchaser must be notified) materially affecting the lot. In *Besser v Alma Homes Pty Ltd* [2012] VSC 460 an equal lot entitlement and liability for the lot sold was altered to one out of 202 on an already registered plan. The purchaser was held entitled to rescind. Pagone J held that whether an amendment would materially affect the lot was determined by objective facts and circumstances, notwithstanding the vendor’s alleged intention to benefit the purchaser by the amendment. In *Lockwood v PSP Investments Pty Ltd* [2013] VSC 10 eight contracts were entered into each for purchase of four apartments in a new multi-storey development and four car parks on the ground floor. The Municipality required the deletion of the car park lots, which would merge into common property. Judd J held the purchaser entitled to rescind. His Honour reasoned:

(a) an amendment may have material effect without being deleterious or adversely affecting the lot or the rights of the purchaser. Here the purchaser had in substance purchased four packages, each consisting of an apartment and car park – there was an interdependency between contracts.

(a) Not only had the purchaser lost the benefit of the car park lot contracts, the enlarged common property would have various effects.

29. Section 9AE broadly enables a purchaser to rescind a contract for sale of a lot in a still unregistered plan of subdivision if the plan is not registered within 18 months after the contract is made, or, if the contract specifies another period, before the end of that specified period. In *Solid Investments Australia Pty Ltd v Clifford & Anor* [2010] VSCA 59 the contracts were expressed to be conditional upon
registration of the plan of subdivision and in substance, within the meaning of s. 9AE(2), specified 30 months after the date of sale. The Court of Appeal held that the a vendor could not also include a Special Condition giving it the right under certain circumstances to further extend the plan registration date “by such a period as the Vendor may reasonably determine from time to time”. This reasoning was applied in *Harofam Pty Ltd v Scherman* [2013] VSCA 104 to render nugatory a Special Condition which included the words -

“If the Plan of Subdivision is not registered within twenty-four (24) months of the Day of Sale or such further time, but such further time to not exceed 6 months, as the Vendor may by notice in writing to the Purchaser require in the event that delays occur as a result of any act, matter or thing beyond the reasonable control of the Vendor which directly or indirectly causes the registration of the Plan to be delayed, either party may, at any time after the expiration of this period or such extended period, but before the Plan of Subdivision is registered, rescind the Contract ... 

The Court of Appeal held that s. 9AE(2) required a specific period of time within which the plan of subdivision must be registered, at the time when the contract is made, and “specifies another period” did not encompass the identification of a period by reference to an ascertainable event, even when the occurrence of that event could be determined objectively.

30. *Bisognin & Anor v Hera Project Pty Ltd* [2016] VSC 75 concerns an issue not previously arising, namely whether the time for registration can be extended due to breach by the vendors of their contractual obligations. An earlier decision by Cameron J dealt with the meaning of “registered”: [2015] VSC 647.

On 29 February 2012 the joint registered proprietors of approximately 5 acres at Cranbourne East entered into a contract to sell the southern three acres to a developer. An unregistered plan was annexed thereto. The time for settlement was duly stipulated. Special Conditions provided that the balance of deposit was payable within 7 days of approval of the plan of subdivision and that the sale was subject to the City of Casey amending a Strategic Plan to accommodate a supermarket on the land sold.

31. The defendant was nominated as the substitute purchaser. On 25 November 2014 litigation between the parties arising out of the contract was settled by terms of settlement which provided that the parties had agreed to make a new contract on the same terms as before but amended, inter alia, to provide: that if the plan was
not registered by 25 August 2015 either party may by notice to the other party end the contract; for the vendors to provide documents related to the draft Urban Design Framework ("UDF") by 2 December 2014 (Special Condition 10); for the vendors to use their best endeavours to co-operate with the purchaser including as to approval and registration of the plan of subdivision and to give effect to the UDF and to make any Growth Areas Infrastructure Contribution ("GAIC") payment promptly if required by the relevant authority (Special Condition 11).

32. The new contract was executed on 13 March 2015. Its special conditions reflected the Terms of Settlement except for Special Condition 8, which is dealt with above under “The importance of careful drafting”. A planning permit for a two lot subdivision was issued on 11 June 2015 which inter alia placed on “the owner” an obligation to perform the permit conditions concerning agreements for the provision of services and was expressed in terms of entering into agreements in respect of each lot.

33. The plan of subdivision was certified by the Council on 3 August 2015. Later in August, however, the vendors served a notice of default alleging that the defendant was in breach of contract for not paying the balance of deposit within 7 days of certification. Proceedings were commenced and on 21 August Cameron J ruled that the balance of the deposit was payable within seven days of registration (not certification) of the plan. Further proceedings were issued by both parties, the vendors desiring and the purchaser opposing termination of the contract. The plan of subdivision remained unregistered.

34. As noted above Sloss J interpreted Special Condition 8 of the contract as meaning that if the plan of subdivision was not registered by 25 August 2015 then either party may end the Contract by notice in writing to the other party. However, her Honour held –
(a) that the vendors could not avail themselves of this condition because they had breached their contractual obligations to use best endeavours. The planning permit required them as “owner of the land” to enter into agreements for the supply of services to the land, to ensure proper drainage, and to pay certain monies, which they had failed to do. In summary they were required, and had failed, to use their best endeavours to give effect to the approval of the plan of
subdivision, and in so doing take active steps to make the southern lot available to be transferred to the purchaser in a timely way; [281], [304]
(b) the purchaser had effectively lost 70 days because the conduct of the vendors, being the period between 16 June 2015 (when the planning permit was notified) and 25 August, and accordingly the period specified in Special Condition 8 for registration of the plan would be extended for that period.

E. OWNER - BUILDERS

35. Section 137B of Building Act is headed “Offence for owner-builder to sell building without report or insurance”. Central is s. 137B(2) which broadly requires owner builders selling the building “within the prescribed period” to provide a building report less than 6 months old, be covered by any required insurance and provide the insurance certificate, and the contract must contain the required warranties (s. 137C, found in General Condition 2.6). The prescribed period is (s. 137B(7)) broadly speaking 6½ years after completion of a building on which domestic building work has been carried out, but this may in certain circumstances be extended, and 10 years for other buildings. Such a contract is voidable by the purchaser at any time before completion (s. 137B(3)). See further the LPLC Column in July 2011 LIJ p. 84.

F. PRE-EXISTING FACT SITUATIONS CAUGHT BY CONTRACTUAL CONDITIONS, WHICH MIGHT HAVE BEEN AVOIDED

36. By greater forethought some situations revealed in recent cases could have been avoided.

Inability to give vacant possession.

37. *Qin v Smith (No. 2)* [2013] VSC 476. A property the subject of a contract of sale was leased until a particular date which was after the settlement date, and this was disclosed in the section 32 statement. However two provisions in the contract, namely under the heading “Lease (General Condition 1.1)” and General Condition 10.1, required the vendor to provide vacant possession at settlement. Derham AsJ held that the fact that the contract incorporated a Vendors' Statement which disclosed a lease expiring after settlement did not absolve from the obligation to give vacant possession.

The vendor who has previously sold the land.
38. In *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542 the vendor had previously entered a contract to sell the land to another (friendly) party under which no money had been paid and the time for completion had passed. Before the time for completion of the second contract it was common ground that the first contract was at an end. Nonetheless the second purchaser served a rescission notice based on breach of General Condition 2.3(d) which warranted that the vendor had not previously sold the land. However, Williams J held that this breach did not found a right to rescission only to damages because the vendor’s principal obligation was to transfer an unencumbered estate in the land at settlement and before settlement it could take any necessary steps to ensure that that this obligation would be met.

**Payment by unusual means.**

39. In *Douglas v Simons Builders P/L and Anor* [2015] VSC 118 the contract, although not specifying that the deposit must be paid in any particular form (cash or cheque or electronic transfer), clearly contemplated that the monies must be paid in a form in which they may be deposited in a banking account or an account in an authorised deposit-taking institution (General Conditions 11 and 12, as to Payment and Stakeholding). The purchaser accordingly breached the contract by in purported payment of the balance of deposit delivering to a firm of solicitors what the court [11(e)] described as “a promissory note dated 5 August 2014 by which Mr Douglas promised to pay to the order of Simons (or an agent or principle thereof) the sum of $30,500 on 20 August 2014 at 3.15 pm at the Property”.

**A purchaser confused about price.**

40. In *Duoedge Pty Ltd v Leong & Anor* [2013] VSC 36 the price specified in the particulars of sale was “916,000 GST inclusive”. The purchaser claimed an input tax credit of one eleventh of this amount, which was disallowed on the ground that the acquisition of residential property was not a taxable supply under the GST Act as there was not a creditable acquisition by the contract. The purchaser claimed a refund of this amount from the vendor, contending that it was not part of the purchase price but paid on account of GST. A Magistrate upheld this submission on the basis of an alleged implied term. Dixon J held that there was no implied term and allowed the appeal. Under the contract the GST risk lay with the vendor because of the particulars of sale
(although adding “GST inclusive” was incorrect – the absence of the words “plus GST” in the box confirmed the concept of “GST inclusive”), with which general condition 13 was not inconsistent. (See generally “Working out GST”, Russell Cocks, September 2013 LIJ p. 82).

**Subject to finance.**

41. In *O’Toole v Kent* [2015] VSC 470 is a reminder of the necessity of contractually stating that the purchase is subject to finance. This contract was not stated to be subject to finance but the purchaser’s evidence was [16(f)]:

“I believe the contract was always subject to finance as my wife and I were utterly dependent upon those funds to perform and complete the contract and we informed the Plaintiff’s selling agent of this prior to my wife signing the contract.”

Mukhtar AsJ held that there was no implied term to this effect, inter alia because this was inconsistent with the express terms imposing an absolute obligation on the purchaser to settle the contract on the completion date.

42. In *Putt v Perfect Builders Pty Ltd* [2013] VSC 442 the contract was subject to a particular lender approving a loan of $475,000 by a particular date. A loan for $476,000 was applied for. The application was declined. The purchasers failed to obtain a refund of the deposit because there was insufficient evidence of an application for a loan of $475,000 or of the purchasers under General Condition 14.2 doing everything reasonably required to obtain loan approval.

**Encroachments.**

43. In *Pamamull v Albrizzi (Sales) Pty Ltd (No 2)* [2011] VSCA 260 the contract contained typical conditions whereby in substance the purchaser admitted that the land as offered for sale and inspected by him was identical with that described in the title particulars. However, an adjoining building encroached onto the land and a building on the land encroached onto adjoining land. The encroachment was held not to be so great as to found an entitlement to rescission under the rule in *Flight v Booth*, ie that a purchaser may have a right to rescind if there has been a substantial defect in title such that it may reasonably be supposed that, but for the misdescription of the subject matter of the sale, the purchaser might never have entered into the contract. The purchaser was also precluded by the special conditions and by having accepted title [133].
44. In *Rise Home Loans Pty Ltd v Dickinson & Anor* [2010] VSC 29 the plaintiff alleged that the defendants represented and agreed that they had clear title to a suburban property, whereas in fact the rear fence line was out by about 30 cm which a neighbour had a right to by adverse possession. On an application by the defendants to strike out certain claims it was held that the original purchaser (not the nominee) had an arguable case for breach of the representations which were conditions of contract, notwithstanding special conditions whereby the purchaser admitted the identity of the property with that described in the Particulars of Sale and an exclusion clause against all conditions and warranties etc not found in the contract.

**G. SPECIAL CONDITIONS – THOSE TO BE BEWARE OF AND CONDITIONS TO BE NOTED.**

45. If acting for a purchaser be alert to special conditions which alter usual conditions, such as increasing the penalty interest rate, shortening the notice period, increasing the number of bank cheques, removing the purchaser’s rights such as for loss and damage before settlement, altering the manner of calculation of adjustments and changing pre-settlement inspection rights (Russell Cocks, December 2015 LIJ p. 72). Be alert also for special conditions transferring responsibility for land tax to a purchaser from the date of contract or otherwise increasing it (see generally Cocks, May 2011 LIJ p. 78, June 2011 p. 80). Where the property is leased be aware of who of the vendor or purchaser is entitled to rent from when. The writer has also been informed of a special condition which requires an adjustment statement 10 days before settlement - difficult to comply with. An extreme special condition could breach the Australian Consumer Law and Fair Trading Act 2012, and in many cases the amounts involved will not justify litigation and the purchaser will have to grin and bear it.

46. Note also –

(a) Under the Owners Corporations Act ss. 24(1) and (3) a special levy may be struck before sale but not be payable until after sale. In such circumstances, the vendor will receive a notice demanding payment after sale, but before settlement. General Condition 21 places the burden of payment on the purchaser, as the notice will have been ‘issued’ after sale, even though the levy itself has been struck before sale;
(b) Special conditions related to what safety measures have been taken by the vendor may be appropriate in the case of sale of a non-residential building: Cocks, October 2009 LIJ p. 81.

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