

# CHAPTER 1

## VENDOR FINANCE AND

## OTHER FINANCE MATTERS

### **1. Seller finance - first mortgage**

*"The Seller will lend the Buyer on settlement the sum of \$(insert loan amount) to assist the Buyer to finance the purchase of the property on the security of a registered first mortgage over the property on the following terms:-*

- (i) Term - (complete) years from the date of completion;*
- (ii) Interest Rate - (complete) percent interest per annum calculated monthly and payable monthly in arrears;*
- (iii) Early repayment - the Buyer will have the right to make early repayment of the whole of the loan with interest only to be paid to the date of repayment only upon giving thirty days notice in writing to the Seller of his intention to do so;*
- (iv) All reasonable costs and expenses (including stamp duty and professional legal costs) involved in the negotiation, preparation, stamping and registration of the mortgage documents to be paid by the buyer;*

*(see clause 2(iii) in this chapter for an alternative paragraph limiting the amount of these costs)*

- (v) All other usual terms of the mortgage must be reasonable and determined by the Sellers solicitors;*

*(This paragraph is only applicable if the Buyer is a company or a company trustee)*

- (vi) The Seller will arrange for all directors and principal shareholders of the trustee company or company, as the case may be, to execute personal guarantees whereby they guarantee the performance by (insert trust or company name) of its obligations under the mortgage.*

*These guarantees will be prepared by the Seller's solicitors at the Buyer's cost (such costs to be reasonable) and will be executed by the guarantors and delivered to the Seller on or before completion date.*

*The Seller's obligations under this clause are a fundamental term of this Contract."*

*"The trouble with having a toy boy is that they always want you to put them through Law School."*

*- An unnamed mature aged woman*

## **CHAPTER 2**

### **DEPOSITS AND COMMISSION**

#### **9. Guarantee that sale not caught by sole agency**

Where a property comes off an unsuccessful auction program or a sole agency with one agent and the seller appoints another agent to market the property, the second agent and the seller should ensure that the ultimate buyer has not been introduced to the property during the term of the first agent's appointment.

If the buyer has been introduced to the property during the term of the first agent's appointment the standard auction agreement or sole agency appointment provides that the first agent is entitled to commission on a later sale by the second agent to that buyer. The seller could therefore face a claim for full commission from both agents.

It is therefore essential to ensure that the following clause is inserted in any Contract procured by the second agent.

*"The buyer warrants that (insert name of Real Estate Agency) introduced her to the property in (insert month and year), and that no other person or agent has introduced or made known to her the fact that the property was for sale.*

*The buyer indemnifies the seller for any financial loss suffered by him in the event that this warranty is incorrect."*

*Alternatively, a seller may sell a property privately after the property has come off an auction program or sole agency appointment. Commission may still be payable to the agent who previously marketed the property unless the seller has the protection of the following clause:*

*"The buyer warrants that she was not introduced to the property by (insert agent's name) and was not made aware that the property was available for sale by any marketing or advertising of the property by (insert agent's name).*

*The buyer indemnifies the seller for any financial loss suffered by him in the event that this warranty is incorrect."*

#### **11. Bank Guarantee in place of deposit**

Many developers will allow Buyers to pay the deposit by way of a Bank Guarantee or bank bond. The following Clause allows a Buyer in these circumstances to lodge a Bank Guarantee or bond in place of a cash deposit.

- “1. *In place of payment of the deposit the Buyer will at the time when it must pay the deposit under this contract provide to the Deposit Holder a Bank Guarantee (“The Bank Guarantee”) from a Bank which has a license to carry on business in Queensland on terms satisfactory to the seller including and without limitation an undertaking from the bank to unconditionally pay on demand to the Deposit Holder the amount of the deposit.*
2. *If the Buyer does not provide the Bank Guarantee then the Buyer will be in breach of this contract entitling the seller to all rights to which it would be entitled as if the Buyer had failed to make payment of the deposit required to be paid under this contract, including and without limitation the right to terminate this agreement. Whether or not the Seller terminates this contract, the Seller will be entitled to recover as a liquidated debt from the Buyer the amount of the deposit stated in this contract.*
3. *The Deposit Holder may make demand on the Bank under the terms of the Bank Guarantee for payment of the sum guaranteed in any circumstances in which the seller is entitled to forfeit the deposit monies under this agreement at which time the Deposit Holder will deal with the monies received from the Bank in accordance with the terms of this contract.*
4. *The payment by the Bank under the Bank Guarantee will to the extent of the amount paid be in satisfaction of the Buyers obligation to pay the deposit under this contract.*
5. *On Completion Date the Buyer will pay the purchase price by way of bank cheque, subject to the adjustment as set out in this contract and return of the Bank Guarantee to the Buyer.*
6. *The seller therefore irrevocably directs the buyer and/or the buyer’s solicitors to pay to the seller’s agent from the purchase monies contemporaneously with completion, the amount of the commission payable to the agent For the purpose of this clause the amount of commission payable by the seller to the seller’s agent is \$(insert amount of commission).”*

## **CHAPTER 3**

### **GUARANTEES -**

### **PERSONAL, RENTAL & OTHERS**

#### **1. Director’s guarantee**

To be used when one of the parties to a Contract is a company or a trust and the other party requires the personal guarantees of the Directors of the company or



# **CHAPTER 13**

## **UNITS & BODY CORPORATE MATTERS**

### **1. Failure to operate body corporate**

In many instances small blocks of units are operated by their owners without ever activating the body corporate which was created on the registration of the complex. In those circumstances you will need to insert special conditions in the Contract.

The purpose of these conditions is to allow the Sellers to apportion with the Buyers the monies paid by them for insurances and require the Buyers to accept the fact that the Body Corporate does not operate. A suitable clause would be:-

*“1. The following provisions apply despite any other clauses in the contract to the contrary.*

*2. Outgoings include monies paid by the Sellers towards the cost of insuring the property and common property in the Scheme including public liability and other usual risks insurance.*

*3. The Buyers acknowledge that since the creation of the lot being sold the owners of the lots may not have operated the Body Corporate and in particular may not have conducted any annual general meetings or struck any levies in respect of the lots or the common property.*

*The Purchasers will make no claim or objection in respect of these matters and waive any rights they may have under this Contract or at law in respect these matters.”*

### **3. Taking possession of unit prior to completion (sale off the plan)**

The following clause may be utilised where there has been a sale of a unit off the plan and the buyer wishes to have the right to take possession before settlement. It must be understood that it is not lawful to occupy a unit in these circumstances before the Local Authority has issued a Certificate of Classification.

*“The seller will allow the buyer possession of the unit at any time before settlement date after a Certificate of Classification has issued from the Local Authority, on a date to be nominated by the buyer provided that the buyer lodges the balance of the purchase price in the seller’s solicitor’s trust account to be held by the seller’s solicitor pending settlement of the sale as the agent for the buyer and the seller, with all interest earned on these monies to be paid to the party entitled to the deposit.*

*No rent will be payable by the buyer for possession of the unit prior to settlement under this clause and the seller's solicitors must invest the monies paid to it pending settlement in a Bank carrying on business in Queensland. These monies will be held at the risk of the seller.*

*Taking possession of the unit by the buyer under this clause will not be acceptance of the title to the unit and will be without prejudice to the buyer's rights under this Contract of Sale."*

## **CHAPTER 14**

### **SURVEYS, SOIL TESTS & INVESTIGATIONS**

#### **6. Flooding**

A cautious buyer of real estate may wish to satisfy themselves that a property has not been affected by flooding. One suitable clause is as follows.

*"This Contract is subject to the buyer satisfying himself within (complete) days from the date of the Contract that the property has not in the past been affected by flooding.*

*If the Buyer determines that the property has in the past been flooded then the buyer may terminate this Contract by notice in writing to the Seller but in order to be able to do so that notice must be accompanied by a written statement from the local authority or a registered surveyor stating that, or to the effect that the land has in the past been affected by flooding, and in that event the deposit will be refunded by the Seller or the stakeholder as the case may be to the Buyer and this matter will be at an end, the deposit refunded to the Buyer and neither party will have any claim against the other apart from any rights either of the parties will have against the other as a result of any breach of this Contract."*

## **CHAPTER 15**

### **GENERAL CLAUSES**

#### **1. Work to be carried out before settlement**

*"A. The seller agrees at its expense by settlement date to replace the garage door with a window of a size and make of the buyer's choice provided however that the window selected is compatible in design, colour and standard with the other windows in the dwelling.*

*B. The seller will also by settlement date at its expense lay underground agricultural piping adequate for drainage purposes along the side boundary of the property to facilitate the flow of rain and stormwater away from the property.*

*C. In addition the seller also acknowledges that the buyer has the right at her expense before settlement date to:*

*(i) install a spa in the courtyard at the rear of the property and erect a pergola over that courtyard; and*

*(ii) to erect a car-port at the front of the property, extend the patio at the rear of the property and erect a pergola off that patio.*

*All works carried out by either of the parties under this clause must be carried out in a good and competent manner and with quality materials and after first having obtained any approval required from the local authority.”*

## **17. Right of sellers to make a Contract unconditional if they secure a better offer**

### **(ALTERNATIVE ONE)**

How should you deal with an impasse where a seller is reluctant to accept a conditional offer to purchase his property because of the belief that a higher offer may be forthcoming from another party in the near future? In such a case the buyers may be unwilling to offer more, and in any event might also need to protect themselves by entering into a conditional Contract eg. by making their offer to purchase subject to procuring a Contract of Sale on their own property.

Here is a solution. The clause is self explanatory.

*“(a) Should the sellers receive another written offer to purchase their property in the form of a binding and enforceable Contract of Sale signed by the proposed buyer and in the form of the Contract of Sale incorporating the Terms of Contract adopted by the REIQ and approved by the Queensland Law Society; and*

*(b) the Contract of Sale is not subject to finance or settlement of the sale of another property; and*

*(c) the proposed buyer has paid a deposit of ten percent (10%) of the purchase price being a purchase price not less than \$(insert amount), then the seller will notify the buyer or the buyer’s Solicitors in writing of that offer.*

*The seller will also provide to the buyer or the buyer’s Solicitors a copy of the signed Contract of Sale together with a copy of the trust account receipt from the agent or stakeholder/deposit holder on that sale for the deposit.*

*The buyer will have seven (7) days from receipt by them or their Solicitors of the copy of Contract of Sale and copy of receipt for the deposit to advise the seller in writing that he waives the benefit of condition(s) (insert number of any special conditions) of this Contract failing which this Contract will be at an end, the deposit will be*

*refunded to the buyer and neither party will have any claim against the other apart from any rights either of the parties will have against the other as a result of any breach of this Contract."*

The only "down side" with the solution set out in the clause above is for the seller, who upon securing a cash Contract for at least the same price cannot then force the buyers to match the second offer. The seller must accept the first Contract if the first buyers waive the benefit of any special condition(s) and in that event the first Contract becomes unconditional. If the first buyers are unable or unwilling to waive the benefit of their special condition(s) then the first Contract fails and the seller is free to accept the other more attractive offer.

## **18. Right of sellers to make a contract unconditional if they receive a better offer**

### **ALTERNATIVE CLAUSE**

A reluctant seller might however be persuaded to accept a conditional offer on the basis that at any time during the term of the Contract the seller can give notice to the buyer to waive the benefit of any special condition(s), failing which the seller may terminate the Contract. A clause such as the one set out below allows the seller at any time, and for any reason, to require the buyer to make the Contract unconditional. This clause is weighted in favour of the seller

*"The seller may at any time give the buyers or their solicitors written notice that it requires the buyer to advise that condition(s) numbered (complete) have been satisfied or waived by them.*

*In the event that the buyers have not given written advice to the seller or the seller's solicitors within four (4) working days of receiving that notice from the seller or the seller's solicitors that condition(s) is/are satisfied or waived, the seller may terminate this Contract and in that event this Contract will be at an end, the deposit refunded to the buyer and neither party will after that date have any claim against the other except in respect of any breaches of the Contract which may have taken place prior to the date of termination."*

## **23. Subject to purchaser satisfying itself regarding the terms of an easement**

From time to time a contract for the sale of vacant land or a house will provide that the property is affected by an encumbrance such as an easement to say, the local authority, for drainage purposes or to allow right of way to a neighbouring property. It is essential from a Buyer's perspective that if the contract of sale notes that the Buyer takes the property subject to such an easement, the Buyer has the opportunity to satisfy itself that it is not adversely affected by that easement. An

appropriate clause to be included in the contract of sale to protect the buyer's interests would be; -

- (a) *“The Seller acknowledges that the Buyers wish to make inquiries and if necessary, carry out a survey on the property, to satisfy themselves regarding the path and location of the easement affecting the property and the terms of the grant of that easement.*
  
- (b) *Without limiting the Buyers' other rights set out in this contract, this contract is subject to the buyer's inquiries and any survey undertaken being to their satisfaction failing which the buyers will be entitled to terminate this contract and in that event the deposit will be refunded to the buyers and this matter will be at an end and neither party will have any claim against the other apart from any rights either of the parties will have against the other as a result of any breach of this Contract.”*

“The worse can be said of a man is that he did not pay attention.”

- William Meredith