

# **Remedies for Breach of Contract for Sale of Land**

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## Introduction:

- 1.1 Traditionally a distinction has been drawn between a right and a remedy. A right (in the sense of a cause of action) is viewed as a prerequisite to a remedy, thus it has been said *for every right there is a remedy*. The right is the primary, and the remedy is the secondary, obligation. There is also the distinction between remedies and procedure. Remedies are the *ends* which the administration of justice seeks to achieve and the procedure is the *means* for achieving those ends. Remedies may be classified as substitutorial, specific or declaratory; *in personam* or *in rem*. Some are discretionary and others as of right. Remedies may have legal, equitable or statutory origins (see *Principles of Remedies*, Covell & Lupton, B/worths, 1995, pp. 2-4; *Remedies*, Kercher & Noone, LBC, 1990, pp. 1-6).
- 1.2 Where a contract for the sale of land “goes off” by reason of one party’s default, the remedies which may be available to the innocent party will depend upon the right infringed and will include, rescission, termination, damages and/or specific performance, as well as analogous remedies under the *Sale of Land Act* 1986 (Vic) and the *Trade Practices Act* 1974 (Cth)\* and *Fair Trading Act* 1999 (Vic)\*. The party may need to invoke the remedy of rectification or in some circumstances, other ancillary equitable remedies, such as an injunction.
- 1.3 In this seminar, there will be a general discussion about the remedies available for breach of contract for sale of land, identifying the circumstances where they may become available and the pre-conditions to their grant.

## Rescission:

- 1.4 Probably the most common, and arguably, the most important, remedy or right in the context of disputes surrounding contracts for the sale of land is that of rescission or termination. Depending upon the circumstances, the

\* see now, s. 18 *Australian Consumer Law* (which is Sched. 2 to the *Competition and Consumer Act* 2010 (Cth.))

remedy may be available to either vendor or purchaser. Often, the determination of which party has this right is a 'watershed' issue, which will determine what other rights or remedies flow; which of the parties is innocent; where the deposit should go and which party must pay damages. Often the question will simply be: by whose default did the contract "go off"?

- 1.5 As is discussed below, loss of bargain, or expectation, damages are only recoverable if the contract is at an end.
- 1.6 The failure to properly exercise the remedy, may result in the right being lost and may affect what other remedies are available. The right must be validly exercised – clearly, unequivocally and in proper form.
- 1.7 A claim to rescission is a right of action but is not itself a *chose in action* (and consequently cannot be assigned separately from the property affected by the transaction that is sought to be rescinded).

## **The different meanings of the word "rescission":**

- 2.1 In the law, the word "rescission" may be used in a number of different senses, rescission:
  - (a) viz. termination or discharge of a contract for breach of condition or breach of an essential term;
  - (b) viz. termination or discharge of a contract on the basis of a contractual condition which confers such right;
  - (c) of a contract by reason of vitiating factors in its formation which gives such a right at law or in equity;
  - (d) or avoidance of a contract pursuant to a statute which confers such right;
  - (e) or termination following acceptance of repudiation;
  - (f) or termination by mutual agreement or abandonment.

(largely drawn from the meanings of the term identified by Meagher Gummow & Lehane, *Equity Doctrines & Remedies*, 3<sup>rd</sup> Ed, para 2401-2405)

- 2.2 It should be noted that the use of the word "rescission" in contexts other than (c) above has been criticized on the basis that there is a clear distinction between rescission, or more correctly, discharge, or termination *of future*

*obligations* on the one hand, and rescission *ab initio* on the other (eg. *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 844; *Halsbury's Laws of Australia*, para [110-9005]; *Remedies*, Kercher & Noone, 2nd Ed., LBC, pp. 257-258). In Victoria, the word "rescission" is used in the General Conditions in Table A of the Seventh Schedule of the *Transfer of Land Act* 1958 (Vic) ("Table A") (see clauses 6 and 7) which has in the past been incorporated into most land contracts in Victoria in the senses referred to in (a) and (b) above and in the *Sale of Land Act* (eg. ss. 9AE(1), 27(8)(b), 32(5)). *cf.* the new General Conditions in the form of contract prescribed under the *Estate Agents (Contracts) Regulations* 2008 ("the new conditions of contract").

**[References hereinafter to the new conditions of contract will be simply "GC"].**

### 3.1 **Rescission for breach of condition or breach of an essential term:**

3.1.1 "Where a party to the contract, upon a breach by the other party of a condition, elects to treat the contract as no longer binding upon him ... thereupon both parties are discharged from further performance of the contract. But rights already acquired are not divested or discharged and causes of action which have accrued from the breach continue unaffected... The contract is... rescinded only insofar as it is executory and thereafter the party in default is still liable for damages" (*Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625-6 per Gibbs CJ; *ibid*, Meagher Gummow & Lehane para. 2401; *McDonald v Dennys Lacelles* (1933) 48 CLR 457 at 476-477).

3.1.2 It should be noted at this point, that where time is of the essence of the contract, each party is bound to perform his or her obligations thereunder strictly in accordance with its terms and failure to do so will constitute a breach entitling the other party to rescind the contract at once. In Victoria, time stipulations are made essential by Clause 5 of Table A of the Seventh Schedule of the *Transfer of Land Act* 1958 (Vic.) (subject to the notice to remedy provision in Clauses 5 and 6

thereof)(but now GC 16.1). If time is not of the essence, the purchaser will first need to serve a notice making time of the essence and then rescind.

3.1.3 Rescission in this sense may take place in many situations including the following:

- (a) vendor unable to deliver vacant possession;
- (b) vendor unable to transfer the thing contracted for (see *Voumard, The Sale of Land*, N. Wikrama, 4<sup>th</sup> Ed at p. 236);
- (c) vendor fails to disclose a defect in title where the defect is substantial or essential (or alternatively, to obtain specific performance with compensation for the defect)(*ibid*, Voumard at p. 221);
- (d) vendor fails or refuses to answer requisitions which will constitute a default and ground a notice to perform the obligation or a notice to complete (*Principles of Land Contracts and Options in Australia*, C Rossiter, Butterworths, 2003 at p. 202). If the purchaser is seeking in the requisition for the vendor to remove a serious or substantial defect in title, the purchaser may terminate, possibly without notice but more probably following the vendor's failure to remove the defect after a notice to remedy has been served (*ibid* Rossiter at p. 203)(*cf.* new conditions of contract);
- (e) where the vendor gives incorrect answers to requisitions (*ibid*, Rossiter at pp. 205-210) which may amount to a warranty or a fraudulent (or negligent misrepresentation)(*ibid*, Voumard at pp 414-15); or
- (f) where the purchaser fails to pay the purchase price;
- (g) *quaere*, whether rescission is available to a purchaser where a vendor breaches the new vendor warranties contained in GC2, or would such a breach simply give rise to a right to damages?

### 3.2 **A contractual condition which gives the right of rescission:**

3.2.1 Specific provision may be made in the contract that upon occurrence of a specified event, one or other, or both, of the parties will have the right to rescind. The consequences of such rescission will depend upon the terms of the contract.

3.2.2 Examples include:

- (a) subject to finance clauses (eg. GC 14)(eg. *Zieme v Gregory* [1963] VR 214);
- (b) entitlement of the vendor where he or she is unable or unwilling to remove or comply with a requisition or objection under General Condition 2 of Table A;
- (c) contravention of terms required by statute (eg. s. 31 (cooling off) and if the contract is a *prescribed contract of sale* (under s. 9AA(7)), terms to satisfy s. 9AA (1)), which if breached give the purchaser a right to rescind.

### 3.3 **Vitiating factors in the formation of a contract which give the right to rescind at law or in equity:**

3.3.1 There are matters which may affect a contract in its formation and will render it voidable *at law* for fraudulent misrepresentation or duress and enable the innocent party to rescind *ab initio* rather than have the contract merely discharged for the future. This remedy is rarely given the equivalent right in equity and the related rights under the *Trade Practices Act 1974* (Cth.), s. 52 and the *Fair Trading Act 1999* (Vic.), s. 9.

3.3.2 Transactions and dispositions (not just contracts) may be set aside *ab initio* (and not merely in futuro) *in equity* which have been improperly procured by equitable fraud, innocent misrepresentation, undue influence, breach of fiduciary duty or other unconscionable conduct. (ibid, Meagher Gummow & Lehane at para 2403-4)

### 3.4 **Statutes which give a right to rescind a contract:**

3.4.1 In the context of contracts for the sale of land, the principal statute is the *Sale of Land Act 1962* (Vic.)("SLA") which gives the *purchaser* many different rescission rights. The SLA also often specifies consequences of rescission.

3.4.2 Under the SLA, a purchaser has the right to rescind a contract in a variety of circumstances including:

- (a) contracts for the sale of land in a subdivision prior to registration of the plan, including, a material amendment to the plan (s. 9AC(2)); vendor failing to comply with ss. 9AA or 9AB (s.9AE(1)); plan of subdivision not being registered within 18 months or other period specified in the contract from the date of contract (s. 9AE(2))\*; substantial discrepancy between any boundary of the land and the boundary as shown on the plan of subdivision (s. 9AH); lot affected by a body corporate sold without requisite insurance (s. 11(1));
- (b) in other contexts, including, terms contract entered into in contravention of the provisions of the SLA (s. 14(1)); false s. 27 statement (s. 27(8)(b)); right to 'cool off'(s. 31(2)) and contract not containing cooling off clause (s. 31(7)); termination for breach of s. 32 (s. 32(5), (7)); where notice for compulsory acquisition of land served (s. 32(5A)); legal practitioner (whose business within 50 kms of GPO) acting for vendor and purchaser under terms contract (s. 33(3)(b)); where a dwelling house destroyed or damaged so as to be, unfit for occupation after contract is entered into (s. 34(1); s. 36).

(\* see, *Everest Project Developments Pty Ltd v Mendoza & Ors* [2008] VSC 366; *Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223; affd on appeal *Solid Investments Australia Pty Ltd v Clifford & Anor* [2010] VSCA 59)

### 3.5 **Acceptance of repudiation:**

- 3.5.1 A right of rescission or termination will be available to the innocent party if the other party repudiates the contract. This will invariably involve a breach of condition as discussed in section 3.1 above.
- 3.5.2 If one party by words or by conduct evinces an intention no longer to be bound by the contract (either by refusing, or being unable, to perform the contract or an essential term thereof), he or she repudiates it, which gives the other party the right (or election) to accept the repudiation and rescind (or terminate) the contract (eg. *Holland v Wiltshire* (1954) 90 CLR 409 at p. 420 per Kitto J; *Nund v*

*McWaters* [1982] VR 575 (FC); *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 per Fullagar at 351-352 and for a recent example in the Victorian context see, *McRae v Bolaro* [2000] VSCA 72).

- 3.5.3 In the context of contracts for the sale of land, the vendor's obligation is to deliver a good title and the purchaser's obligation is to pay the price. These are concurrent and mutually dependent obligations in the absence of any provision in the contract to the contrary. If one party informs the other that it cannot, or will not, complete the contract by the settlement date, he or she commits an anticipatory breach amounting to a repudiation which gives the innocent party a right to terminate.
- 3.5.4 Presented with the repudiatory conduct of the guilty party, the innocent party has an *election* to either refuse to accept the repudiation and continue to require performance, or accept the repudiation and bring the contract to an end. There is some high authority for the proposition that communication of the acceptance of the repudiation is not strictly necessary (*Holland v Wiltshire* at p. 416 per Dixon J; *Poort v Development Underwriting (Vic) Pty Ltd [No. 2]* [1977] VR 454 (FC)).
- 3.5.5 If the contract is thus “rescinded”, or discharged, it is ended only insofar as future performance is concerned and remains ‘live’ for the awarding of damages for prior breaches including the breach which constituted the repudiation.

#### 4.1 **Statutes which create causes of action for statutory misrepresentation or misleading and deceptive conduct:**

- 4.1.1 In recent years, a great number of rights and remedies have been created by statute, many of which have taken away much of the ground previously occupied by common law remedies.
- 4.1.1 A contravention of s. 52 *Trade Practices Act* 1974 (Cth.) (“TPA”) may allow the Court to impose remedies very similar to rescission. This much litigated section extends to any conduct that is likely to mislead

or deceive, as, for example, the making of negligent statements and false representations. Section 52 does not of itself create liability rather it establishes a norm of conduct and failure to observe that norm can be met by a range of remedies under the Act or under the general law. In the present context this includes, for contracts to be discharged and modified under s. 87 TPA where loss and damage has been, or is likely to be, suffered (viz. order declaring contract void or void *ab initio* (s. 87(2)(a), varying a contract (s. 87 (2)(b)) or refusing to enforce any provisions of a contract (s. 87(2)(ba))(see, generally, R. V Miller, *Annotated Trade Practices Act*, 33<sup>rd</sup> Ed., 2011, Thomson Reuters, Australia). If the party misled or deceived has suffered loss and damage as a result of the conduct, he or she may also recover damages under s. 82 *Trade Practices Act*. See now, s. 18 *Australian Consumer Law (which is Sched. 2 to the Competition and Consumer Act 2010 (Cth.))*

- 4.1.2 In Victoria, the *Fair Trading Act 1999 (Vic)* ("FTA") has enacted many of the provisions of the TPA. Comparable provisions to ss. 52 and 87 TPA can be found in ss. 9 and 158(2)(a), (b) and (c) FTA.
- 4.1.3 By way of example, a purchaser may seek to rescind a contract if in advertising land, a vendor or its agent has made representations misdescribing the property which induced the purchaser to enter into the contract to purchase it. The purchaser may seek to establish that the representations were misleading and deceptive in contravention of s. 52 TPA. If successful, and if avoided prior to completion, the Court would ordinarily order rescission, a refund of the deposit (eg *Byers v Dorotea* (1986) 69ALR 715) and interest. If after completion and the purchaser has retained the property, the damages would generally be based on the difference between the price paid for the property and its true value (*Gates v City Mutual Life Association Society Ltd* (1986) 160 CLR 1) and recoverable consequential losses.

## 4.2 **Mutual abandonment/discharge by agreement:**

4.2.1 Where each party abandons the contract, the contract is rendered void *ab initio*. This may be viewed as rescission or discharge by implied agreement (*DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423). In such circumstances the parties would be restored to their pre-contractual positions which would include the deposit being repaid to the purchaser.

4.2.2 The parties to a contract for the sale of land may also expressly agree to its discharge. The usual requirements for an enforceable and binding contract must be present, including consideration.

## 5.1 **Essential pre-requisites to the exercise of a right to rescind:**

5.1 In general terms, rescission is only open to a party who:

- (a) is willing to perform the contract on its proper construction (otherwise he is not what is described as “an innocent party”)(*ibid*, *DTR Nominees* at 138 CLR 433);
- (b) did not bring about or materially contribute to the occurrence of the event which gave rise to the right of rescission (eg. *Nina’s Bar Bistro v MBE Corporation* [1984] 3 NSWLR 613); and
- (c) is ready, willing and able to perform his obligations at the time when he purports to terminate the contract (*Foran v Wright* (1989) 168 CLR 385).

5.2 Rescission is only available where vitiating factors in the formation of a contract give rise to a right to rescind, even in equity (see, category 2.4 above), if *substantial restitution* is possible, even if precise *restitutio in integrum* is not possible. For common law rescission, full and complete restitution must be possible (see, *Alati v Kruger* (1955) 94 CLR 216 at 223-4).

5.3 Where rescission in equity is sought, the remedy is discretionary and the usual equitable defences apply, including laches and acquiescence.

## 6. **Loss of the right to rescind:**

### **Under the Common Law and in Equity:**

6.1 The right to rescind will be lost if the party with such right affirms the contract (*Sargent v ASL Developments Ltd* (1974) 131 CLR 634), or if there is waiver or estoppel (*Cth v Verwayen* (1990) 170 CLR 394). Delay in exercising the right may raise an estoppel, or be regarded as an election to affirm the contract or conduct precluding rescission (*Principles of Equity*, 2<sup>nd</sup> ed at pp 933-4).

6.2 A right to rescind for innocent misrepresentation may be lost after completion. Even though the rule in *Seddon's* case has been disapproved, the High Court has recently cited it with apparent approval (*Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 585) and it has been applied in the context of land contracts in the past (eg *Svanosio v McNamara* (1956) 96 CLR 186). The rule does not apply if there has been fraud or even equitable fraud (*Taylor v Johnson* (1983) 151 CLR 422 at 431).

6.3 A vendor may be precluded from rescinding if it has engaged in unconscientious conduct in exercising his or her contractual right to terminate (*Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; (2003) 217 CLR 315).

### **Statutory:**

6.4 Specific statutory provisions which confer rights of rescission will generally state when the right may be exercised and can also apparently be lost by affirmation (eg. *Australian Horizons (Vic) Pty Ltd v Ryan Land Co Pty Ltd* [1994] 2 VR 463)(cf. *Everest Project*

*Developments Pty Ltd v Mendoza & Ors* [2008] VSC 366 at para [97]-[101] per Hargrave J).

## 7. **The consequences of rescission:**

- 7.1 The consequences of rescission for the innocent party are that certain remedies may become available, the foremost of which is a right to damages (which is discussed in sections 11 – 13 below).
- 7.2 As has been noted (in paragraph 3.1.1), where a party elects to rescind a contract for breach of condition both parties are discharged from further performance but, as noted above, rights are not divested or discharged which have already been unconditionally acquired. Where a contract is rescinded because of matters which affect its formation, the parties are restored, as far as possible, to their pre-contractual positions.
- 7.3 A purchaser who rescinds the contract upon a breach committed by the vendor will be entitled to recover his deposit and any other moneys paid by him under the contract and will also be entitled to recover damages for the breach (*ibid* Voumard at p. 448). Damages are dealt with in more detail below.
- 7.4 Where the vendor validly rescinds a contract for a failure by the purchaser to comply with a condition or for breach going to the root of the contract, the deposit is generally forfeited to the vendor, the vendor is relieved from further performance and he or she is entitled to sue the defaulting purchaser for damages.
- 7.5 Indeed, if a vendor validly rescinds a contract upon the failure of a purchaser to complete in accordance with an essential time stipulation, then, in the absence of fraud, accident or mistake or other conduct of the vendor which has in some significant respect caused or contributed to the breach of the essential time stipulation, the contract

will be at an end and the purchaser will have no basis for seeking specific performance (ibid *Tanwar*). *Tanwar* is discussed in more detail below.

- 7.6 Where a purchaser rescinds the contract for misrepresentation or some other vitiating factor which affects its formation, the usual remedy is for orders for rescission and repayment of the deposit (eg. *Simons & Anor v Zartom Investments Pty Ltd* [1975] 2NSWLR30). Damages are not available for innocent misrepresentation. The misrepresentation must be negligent or fraudulent (or a 'statutory misrepresentation' under s. 52 *Trade Practices* 1974 (Cth.) or s. 9 *Fair Trading Act* 1999 (Vic.)) to attract damages.
- 7.7 The consequences of rescission or discharge by agreement depend upon the terms of the agreement. The parties can agree what will take place upon the contract being discharged.

8. **Relief from forfeiture in favour of a purchaser following a valid termination of a contract by a vendor: *Tanwar Enterprises Pty Ltd v Cauchi*:**

- 8.1 In *Tanwar*, the vendors (respondents) duly rescinded a contract for the sale of land which had been varied by deed when the purchaser failed to settle on the agreed date but obtained the required funds by the next day. The High Court held that unless the purchaser could establish that the vendor had engaged in unconscientious conduct in exercising his or her right to terminate, the purchaser had no remedy. Generally it will be necessary for the vendor's conduct to have caused or contributed (in a significant respect) to the breach of the essential time stipulation for the purchaser to have a remedy. As the purchaser could not establish any such conduct, the ordinary consequences of the vendor's termination of the contract for such breach ensued and the purchaser was without any remedy. This case has been applied recently in Victoria in *Aussie Invest Corp Pty Ltd v Pulcesia Pty Ltd* [2005] 13 VR 168.

- 8.2 The High Court pointed out that the purchaser's interest in land prior to completion "is commensurate with the availability of specific performance". Once a contract was terminated the relief available to the purchaser (if any) was specific performance and not relief against forfeiture. The latter was not available as a purchaser under a validly terminated contract had no interest in land.
- 8.3 The Court held that in order for the purchaser to obtain relief he or she had to establish that the vendor had engaged in *unconscientious conduct* in exercising his or her contractual right to terminate. Mere reliance on a legal right was insufficient. The "special heads of fraud, accident, mistake or surprise" identify in a broad sense the circumstances when it will be unconscientious for the vendor to rely on a contractual time stipulation. These special heads "do not disclose exhaustively the circumstances which merit this equitable intervention. But, at least where accident and mistake are not involved, *it will be necessary to point to the conduct of the vendor as having in some significant respect caused or contributed to the breach of the essential time stipulation*" (emphasis added). Fraud evidently includes equitable fraud (eg. innocent misrepresentation, breach of fiduciary duty) and would include a representation by the vendor which could be found an estoppel. Accident will be confined to events which were unforeseeable. Mistake is related to accident.

## 9. **Tanwar – Victorian position:**

- 9.1 In Victoria where Table A is incorporated into the contract, or where the new conditions of contract are applicable, a 14 day notice to remedy (or default notice) is required to be served and it is only if this notice is not complied with that the contract is rescinded (see General Conditions 5 and 6 of Table A; GC 27)(cf NSW). If a Victorian vendor faced with a similar situation to that in *Tanwar*, served a rescission notice under Table A or default notice under GC27, the result would have been different as the purchaser would have had time to remedy the default. However, if a Victorian purchaser had failed to remedy the

breach within the 14 day period, then in the ordinary case, unless there was accident or mistake, or the vendor had caused or contributed to the purchaser's breach in a significant respect, the contract would be validly terminated and the purchaser would be left without any remedy.

- 9.2 A failure by the purchaser to pay the balance of the price on the agreed date for settlement, where time is of the essence of the contract, will constitute a breach going to the root of the contract. Such breach will confer on the vendor the right to rescind at once (ibid, *Holland v Wiltshire* at p. 418 per Kitto J) subject to the terms of the contract, and specifically in Victoria, the provisions of Clauses 5 and 6 of Table A (GC 27 and 28) being complied with.
- 9.3 It is clear that a vendor in Victoria faced with a defaulting purchaser is not confined to the remedy under Table A and the new conditions of contract. The vendor may also exercise his or her rights under the general law. Where the vendor elects to bring the contract to an end because it has been repudiated by the purchaser, it is not necessary for him to give the notice required by Table A (*Walter v Cooper* [1967] VR 583; *Nund v McWaters* [1982] VR 575 at 589).
- 9.4 If the purchaser's failure to pay the balance of the price, together with any other relevant words and conduct by that party, sufficiently shows an intention *no longer to be bound by the contract*, the vendor may simply accept the repudiation, thus immediately putting an end to the contract (without the need for serving a rescission notice under Clauses 5 and 6 of Table A or GC27 and 28). However, if the purchaser has simply failed to pay the balance of the price without more, then it is suggested that a vendor will need to ground its rescission on breach of condition rather than repudiation, and in order to rescind in these circumstances, it will first be necessary to serve a notice to complete as required by Clauses 5 and 6 (and GC27 and 28) (*Sibbles v Highfern* (1987) 76 ALR 13 at 22). If it is more advantageous for the vendor to terminate by acceptance of repudiation, it will usually be sensible for the vendor to serve a notice to complete. This will assist him or her to demonstrate, by reference to

the other party's non-compliance with the notice, that the other party has repudiated his obligations under the contract, thus entitling him or her to rescind (*Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117 at 131).

- 9.5 As has been noted, if it is decided to rescind or terminate, the right must be validly exercised – clearly and without equivocation and in proper form.

## 10. **Other remedies:**

### **Introduction:**

- 10.1 To set the scene and the context, in the case of *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, Sir Owen Dixon stated as follows:

“When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach. (See *Boston Deep Sea Fishing and Ice Co. v. Ansell*, per Bowen L.J., at p. 365; *Hirji Mulji v. Cheong Yue Steamship Co.*, per Lord Sumner, at p. 503; *Cornwall v. Henson*; *Salmond and Winfield, Law of Contracts*, (1927), pp. 284-289; *Morison, Principles of Rescission of Contracts* (1916), pp. 179, 180.) (1933) 48 CLR 457 at 476 – 477”

## 11. **Damages in contract:**

- 11.1 If a contract for the sale of land comes to an end by reason of the default of one of the parties, the innocent party will usually have suffered loss and damage as a result, for which he or she will justifiably wish to be compensated.
- 11.2 The general rule of the common law is that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position as if the contract had been performed” (Pape J in *Cowan v Stanhill Estates Pty Ltd No 2* [1967] VR 641 at 648; Parke B in *Robinson v Harman* (1848) 1 Exch 850 at 855; 154 ER 363 at 365). “(T)he words “*loss by reason of a breach*” encapsulate the ideas of causation, remoteness and mitigation”: *Holmark Construction Company Pty Ltd v Tsoukaris C/A Unrep.* 16.5.88; (1988) NSWConv R 55-397; BC8801975 per Priestley JA. In *Gates v City Mutual Life Association Society Ltd* (1986) 160 CLR 1 at 11-12 Mason, Wilson and Dawson JJ in joint reasons stated:
- "(i)n contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed - he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss)."
- 11.3 However, to be recoverable the loss and damage must be seen as arising naturally from the breach or must be within the reasonable contemplation of the parties as the probable result of a breach at the time when the contract was made (*Hadley v Baxendale* (1854) 9 Exch 341 at 354; 156ER 145 at 151). Loss under the so-called first limb is that which arises naturally in the usual course of things as the probable result of the breach. To establish the second limb the plaintiff must prove that the defendant knew or ought to have known that such loss would be a probable result of the breach.
- 11.4 Damages for breach of contract for the sale of land are often measured by, but not limited to, the difference between the purchase price and the market value of the land at breach and may include incidental expenses which have necessarily flowed from the breach (ibid, *Cowan* at p. 648).

11.5 The following elements must be established in order to recover damages for breach of contract:

- (a) a breach of contract;
- (b) causation, that is, the defendant's breach has caused a loss to the plaintiff;
- (c) the loss suffered by the plaintiff is not too remote; and
- (d) the plaintiff has acted reasonably in mitigating his or her loss.

The burden of proof in relation to the first three elements is on the plaintiff and for the fourth element (the failure to mitigate) it is on the defendant. The standard of proof is generally on the balance of probabilities (the standard may not be so strict where loss cannot be easily measured such as loss of chance)(see, *Principles of Remedies*, Covell & Lupton, Butterworths, 1995 at p. 44-45 referring to *Sellars v Adelaide Petroleum NL* (1994) 179CLR 332 at 355-6). Loss of bargain damages are usually assessed at the time of breach except in special circumstances (*Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 161).

11.6 Unless actual loss can be established, only nominal damages will be recoverable.

11.7 Termination of the contract is not required in order for the plaintiff to obtain damages *except* in cases of anticipatory breach and claims for expectation or loss of bargain damages (*Sunbird Plaza Ltd v Maloney* (1988) 166 CLR 245 at 260). As Mason CJ stated in *Sunbird Plaza* at 260-61:

“Loss of bargain damages are recoverable only if the contract is at an end. Once termination due to the defendant's wrongful conduct is established the plaintiff is entitled to damages for loss of bargain *Dominion Coal Co Ltd v Dominion Iron & Steel Co Ltd* [1909] AC 293, at p 311. Barwick CJ suggested in *Ogle* (1976) 136 CLR, at p 450, that termination is not an essential element in an action for loss of bargain damages, except in the case of anticipatory breach, but the preponderant opinion in Australia and England is

against his view: see *Ogle* (1976) 136 CLR, at p 458, per Gibbs, Mason and Jacobs JJ; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, at p 31 per Mason J (with whom Wilson and Deane JJ agreed generally, and Dawson J agreed); *Photo Production Ltd v Securicor Ltd* [1980] AC 827, at pp 844-845, 849.”

11.7 In order to be entitled to remedies for breach of contract the plaintiff must be able to show that he or she is ready, willing and able to perform his or her side of the contract (*Foran v Wright* (1989) 168 CLR at 408; 452).

## 12. **Vendor’s right to damages:**

12.1 In practice, the vendor’s right to damages will ordinarily arise under the contract or the common law consequent upon rescission or termination by reason of the purchaser’s default.

12.2 In a given case, if the vendor validly rescinds a contract for the sale of land by reason of the purchaser’s default (in duly completing the contract and paying the price), by exercising his or her rights pursuant to Clauses 5 and 6 of Table A, his or her remedies are set out in Clause 6(3)(b):

(a) an amount equal to 1/10<sup>th</sup> of the purchase price is forfeited to the vendor; and

within one year of the date of rescission, the vendor may at his or her option, either:

(b) (i) retain the land and sue for damages; *or*  
(ii) resell the land and recover any deficiency in the price upon resale and any resulting expenses by way of liquidated damages.

Now see, GC’s 27 and 28 in the new conditions of contract.

- 12.3 To elaborate on these provisions, under Clause 6(3)(b)(ii) and GC28.4(c)(ii), the vendor is entitled to the deficiency in the price upon resale and any resulting expenses as “liquidated damages”. The advantages of a liquidated damages clause are that the vendor can sue for a liquidated amount and obtain judgment for such amount without the necessity of proving each item of loss. The defence will be confined to alleging that the sum claimed is unenforceable as a penalty (ibid, Rossiter at p. 305). The liquidated sum must still be a reasonable pre-estimate of damage and (judged at the time of the contract and not the breach) not extravagant and unconscionable in comparison with the loss likely to flow from the breach (ibid, Rossiter at pp. 306-308) citing *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79 at 86-7 and see *Amev-UDC Finance Ltd v Austin* (1986) 162 CLR 170). There are cases which support the view that the vendor’s duty on re-sale is analogous to that of a mortgagee exercising a power of sale (eg. *Loughbridge v Lavery* [1969] VR 912) and others which state that after termination the purchaser no longer has any beneficial interest in the land akin to an equity of redemption but the vendor is still required to take steps to mitigate his or her loss and is thus required to act reasonably (eg. *Jampco Pty Ltd v Cameron (No 2)* (1985) 3NSWLR 391).
- 12.4 Although under Clause 6(3) and GC 28.4(d) the vendor may retain any part of the price paid to him pending the determination of damages, once those damages are worked out, any part of the price paid by the purchaser over and above the deposit may be recovered by the purchaser (Dixon J in *McDonald v Dennys Lacselles* at 478 citing *Mayson v. Clouet* [1924] AC 240)(moneys paid by purchaser in excess of the deposit recoverable in an action for moneys had and received upon a total failure of consideration: ibid, *Cowan* at p. 650-1; *Bot v Ristevski*; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446; 455). The deposit is paid in consideration of the vendor’s entry into the contract but the price is paid in consideration of the vendor’s transfer of title (ibid, *Bot v Ristevski*; cf ibid Rossiter at p. 139). Even if the parties had agreed that the vendor had an absolute right at law to retain the instalments, in the event of the contract going off, in equity such a contract is considered to involve a forfeiture from which the

purchaser is entitled to be relieved. It appears that without Clause 6(3); GC28.4)(d), the vendor would be unable to retain from the amount of the instalments the amount of his loss occasioned by the purchaser's abandonment of the contract (pending the determination of damages). A vendor may, of course, counterclaim for damages in the action in which the purchaser seeks to recover the instalments (ibid, Dixon J in *McDonald v Dennys Lacselles* at 478-79) as may a defaulting purchaser counterclaim for the return of instalments of the price in excess of the deposit in a proceeding by the vendor for damages for breach.

- 12.5 The "resulting expenses" may include estate agent's commission and legal costs incurred on the re-sale, rates, taxes and other outgoings incurred after the completion of the sale ought to have taken place, as well as legal costs and interest on the price (ibid Rossiter at pp. 308-309).
- 12.6 When the vendor validly rescinds or terminates a land contract pursuant to Table A or otherwise, the contract is discharged as a source of further obligation. In these circumstances, the vendor has the right to sue the purchaser for damages for breach of the contract which right is independent of and additional to the rights to sue conferred by Cl 6(3)(b)(i) and Cl 6(3)(b)(ii) of Table A (and GC28): *Victorian Economic Development Corp v Clovervale Pty Ltd* [1992] 1 VR 596.
- 12.7 As noted above the vendor's damages are usually calculated on the basis of the difference between the contract price and the market value at the date of completion (ibid, Rossiter at p. 301; *Carpenter v McGrath* (1996) 40 NSWLR 39) and are assessed at the date of breach.
- 12.8 Damages may include "foreseeable future loss" including damages for loss of income or profits (ibid). In addition the vendor will be entitled to recover any reasonably foreseeable consequential loss. For example, if the vendor has purchased another property on the strength of the sale, which he or she is unable to complete by reason of the sale

going off, he or she will be entitled to recover the forfeited deposit paid by him or her to their vendor (ibid, Rossiter at 302 citing *Carpenter v McGrath*), as well as any damages paid to that party. If the vendor chooses to avoid defaulting on his or her purchase by obtaining bridging finance, he or she will claim this as part of their damages (ibid, at 302-303). In each case the particular items of loss and damage must be within the reasonable contemplation of the parties.

12.9 Some further general observations may be made about the vendor's right to the deposit and damages:

- (a) the vendor is entitled to 10% of the price whether or not a deposit of this amount, or even if no deposit, has been paid (*Bot v Ristevski* [1981] VR 120 per Brooking J)(GC28.4(a));
- (b) in calculating the vendor's damages, the deposit paid by the purchaser must be brought into account (*Mallet v Jones* [1959] VR 122; bid, Cowan at pp. 648-9)(GC28.4(e));
- (c) equity has jurisdiction to relieve the purchaser against forfeiture of the deposit (ibid, Rossiter at pp. 142-147). There is also a limited statutory jurisdiction to relieve against forfeiture of the deposit (s. 49(2) *Property Law Act* 1958).

12.10 Where the vendor was not entitled, or elected not, to terminate the contract, the measure of the vendor's loss will be measured by reference to the delay in payment of the price. Usually this will amount to interest on the balance of the purchase price from the date of completion to the date of the balance of the price is paid.

12.11 The vendor is entitled to an equitable lien where he or she has completed the contract without receiving all or part of the purchase price. The vendor's lien will support a caveat (ibid, Rossiter at pp. 332-3; *Barry v Heider* (1914) 19 CLR 197).

### 13. **Purchaser's right to damages:**

- 13.1 A purchaser's right to damages will arise in a number of circumstances.
- 13.2 If the vendor repudiates the contract by refusing, or being unable, to perform his or her obligations thereunder, and the purchaser terminates the contract (specific performance being impossible), the purchaser should be entitled to recover the deposit and the costs of investigation of title as well as damages for loss of bargain (if any)(eg. *Holmark Construction Company Pty Ltd v Tsoukaris C/A Unrep.* 16.5.88; (1988) NSWConv R 55-397; BC8801975: vendors unable to procure a discharge of mortgage and hence unable to transfer the land in accordance with the contract. Subsequently land sold by the vendor's mortgagee exercising its power of sale).
- 13.3 Traditionally, where the vendor breached the contract by failing to give a good title, the rule in *Bain v Fothergill* (1874) LR 7HL 158 confined the purchaser to recovery of the deposit and costs of investigation of title and precluded recovery of loss of bargain damages. It is unclear whether this rule survives in this state. It has been disapproved by the New South Wales Court of Appeal (*ibid*, *Holmark* at p. 3) as well as legislated against in some states. The rule would not preclude reliance damages (for wasted costs and expenses) which can be recovered if a purchaser has not suffered or cannot prove damages for loss of bargain (*ibid*, Rossiter at p. 296). It appears that this latter principle is of general application (*ibid*, *Amann* at 174 CLR 81-6, 99-108, 134-7, 154-7, 61-4).
- 13.4 Where the vendor fails to give "vacant possession" of the property, the purchaser will be entitled, in appropriate circumstances, to obtain damages for the costs of obtaining vacant possession, including, legal costs, if proceedings are taken against a tenant, costs of removal of rubbish, damages for delayed possession, including interest from the date of completion to the date vacant possession is given, the costs of alternative accommodation, and removal and storage costs, if the loss

or damage claimed is within the contemplation of the parties (ibid, Rossiter at pp. 299-301; King v Poggioli (1923) 32CLR 222 at 250-1 (stock losses due to delay in settlement); Phillips v Lamdin [1949] 2KB33 (plaintiff recovered damages for loss of business income, additional removal and storage costs); Raineri v Miles [1981] AC 1050 (alternative accommodation costs)).

- 13.5 The normal measure of damages for loss of bargain in cases of breach of contract for sale of land is the difference between the contract price and the market value of the land at the time of the breach (*Wenham v Ella* (1972) 127 CLR 454; *Cowan v Stanhill Estates Pty Ltd* (No 2) [1967] VR 641; *Nangus Pty Ltd v Charles O'Donovan Pty Ltd* [1989] VR 184). In *Wenham* the purchaser's damages included the profits that would have been made from the land if it had been transferred when it should have been. The market value will be the subject of expert evidence unless there has been a re-sale in which case the re-sale price will be evidence of market value (ibid, Rossiter at p. 293). Consequential losses are also recoverable providing they are not too remote.
- 13.6 If a purchaser duly rescinds a contract under Table A, he or she is entitled to "be repaid any money together with interest and costs payable under (the) contract and these shall be a charge on the land until payment" (Clause 6(3)(a); GC28.3).
- 13.7 Even apart from Clause 6(3)(a)(GC28.3), it is noted that a purchaser who pays the deposit to the vendor or his agent (but not to a stakeholder other than the vendor) obtains an equitable lien over the land the subject of the sale to secure repayment of the deposit (if necessary). He or she may be able to lodge a caveat on the land on the basis of such interest. The purchaser becomes a secured creditor of the vendor and if the vendor fails to repay the deposit, the purchaser will become entitled to enforce the security by obtaining an order for sale of the property by a Court (Rossiter at pp. 110-111)
- 13.8 Where the purchaser has a right to terminate the contract for breach but chooses to keep the contract on foot, the purchaser will be entitled

to damages or compensation. For an error or misdescription of the property or the title, the purchaser will usually seek the latter rather than damages (eg. *Ibid Rossiter* at p. 298).

13.9 If the purchaser validly rescinds a contract for misrepresentation or misleading and deceptive conduct prior to settlement, the Court would ordinarily order a refund of the deposit and interest. If after completion and the purchaser has retained the property, the damages would generally be based upon the difference between the price paid for the property and its true value together with any recoverable consequential losses.

#### 14. **Specific performance:**

14.1 Where a purchaser is faced with a recalcitrant vendor who refuses to complete the contract and transfer the property, the purchaser, rather than terminating the contract and suing for damages, may wish to compel the vendor to perform the contract. The remedy he or she would choose in these circumstances is specific performance.

14.2 In many other instances, where a purchaser is suing for rescission and return of the deposit, a vendor will defend the proceeding and counterclaim for specific performance, and damages in the alternative.

14.3 Specific performance is an equitable remedy which compels a party to a contract to perform his or her obligations under the contract in accordance with its terms. It is commonly granted in relation to contracts for the disposition of interests in land.

14.4 It may be necessary to seek rectification as a precursor to seeking specific performance. In order for a Court to grant this remedy it must be satisfied that:

- (a) the parties made a written contract or other instrument;
- (b) there is a common mistake by them as to what the instrument contains;

- (c) the parties' intention as to what the instrument should contain was common at the time of execution; and
- (d) there are no discretionary grounds for refusing the remedy.

(ibid, Covell & Lupton at p. 223; ibid, Meagher Gummow & Lehane at Ch. 26)

14.5 "Specific performance" is used in two different senses. In its proper sense it is concerned with *executory* contracts (eg. a contract of sale of land which requires the execution of a conveyance or transfer) rather than *executed* contracts (contracts which do not require the execution of an instrument or the doing of an act for the purpose of putting the parties in the position contemplated – the contract does it itself). "Specific performance, in the proper sense, is a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties' rights are settled and defined in the manner intended" (Dixon J in *JC Williamson Ltd v Lukey and Mulholland* (1931) 45CLR 282 at 297). If a Court orders a party to an executed contract to perform his obligations or some of them thereunder, the relief is not specific performance in the proper sense but merely relief analogous to it (Meagher, Gummow & Lehane, *Equity Doctrines and Remedies*, 3<sup>rd</sup> Ed., 1992 at pp. 495-6). Such an order may be framed as an injunction.

14.6 The pre-requisites for an order for specific performance are as follows:

- (a) a binding contract for which there is consideration and which the defendant is not entitled to rescind;
- (b) a breach by the defendant;
- (c) damages are not an adequate remedy; and
- (d) (at least in cases of specific performance in the proper sense), the plaintiff has performed, or is ready and willing to perform his contractual obligations.

Even if each of these elements are present, the remedy may still be refused because in common with all equitable remedies, its grant is

discretionary and the considerations set out in the next paragraph (derived from Meagher Gummow & Lehane wherein they are denoted as “Defences”) may be relevant (ibid, Covell & Lupton at p. 151; ibid, Meagher Gummow & Lehane at pp. 497-98).

14.7 Defences to a claim for specific performance are myriad and include:

- (a) such an order would compel the performance of personal services or the maintenance of a personal relationship;
- (b) the enforcement of the order would require the continual supervision of the Court;
- (c) the contract was entered into as a result of mistake or misrepresentation;
- (d) the contract was induced by unfair conduct on the part of the plaintiff or that its enforcement would impose undue hardship on the defendant;
- (e) the plaintiff is substantially in breach of the contract, or is not ready and willing to honour his or her obligations thereunder;
- (f) the remedy sought is specific performance of part only of the contract (the Court must be able to compel performance of the contract as a whole or compel performance of part);
- (g) performance is impossible;
- (h) specific performance would be futile;
- (i) mutuality is lacking;
- (j) the plaintiff is guilty of laches or has acquiesced or lacks clean hands;
- (k) the contract is unenforceable for want of writing except where the lack of writing is due to fraud or dishonesty on the part of the defendant or where there is a sufficient act of part performance;
- (l) bad or doubtful title (which a purchaser cannot be compelled to accept);
- (m) misdescription or deficiency (eg. where the vendor contracts to sell more land than he can give title to) – the vendor may still have specific performance unless it is of a material and substantial nature in the sense that but for the misdescription the purchaser may never have entered into the contract at all. The purchaser as plaintiff may have specific performance with compensation. Vendor may be compelled to convey what he can.

(ibid, Meagher Gummow & Lehane at pp. 502-23)

14.8 Interestingly, it has been decided by the High Court that a vendor who is entitled to rescind a contract for the sale of land because of a purchaser’s failure to complete, but who elects to sue for specific performance is not thereby precluded from later rescinding the contract and claiming damages for the continued refusal by the

purchaser to complete (*Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444).

- 14.9 A procedure worth noting in this context is the power of the Court to secure the enforcement of an order for the execution of a document or the endorsement of a negotiable instrument by the procedure under s 22 *Supreme Court Act* 1986. This power is independent of the Court's power to obtain compliance by committal and sequestration under r 66.05: *Leach v Leach* [1965] VR 599 at 604–5. See, Williams, *Civil Procedure* at para. [I 66.05.0];[I76.01.65].

## Conclusion:

15. In practice, when a contract for the sale of land “goes off”, a ‘watershed’ issue will be the question of which party has lawfully terminated, or rescinded, the contract. Each of the parties’ consequential rights and obligations will often depend upon a proper analysis of this issue.
16. In order to give proper advice, it is important to correctly identify the right, sought to be established, or, allegedly infringed, and the manner of the exercise, or vindication, of such right, in other words, what remedy or remedies are available. This will be critical in deciding, inter alia, whether or not to issue proceedings, and if so, how they should be framed, and whether prior to proceedings, any letters need to be written or action taken, to set a proper foundation for, or to seek to avoid, legal action.
17. Once a true appreciation of the application of legal principle to the particular facts at issue has been formed, in this as in other contexts, the decided course of action should be pursued promptly and without equivocation. To adapt the equitable maxim, the laws serve the vigilant (and the decisive), not those who sleep upon their rights.

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