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NSW CONVEYANCING UPDATE

ACCEPTING LESS THAN A 10% DEPOSIT & PAYING DEPOSITS BY INSTALMENTS

A Purchaser under a Contract for the Sale of Land in NSW usually pays a deposit, traditionally being 10% of the Purchase price, at exchange of Contracts. The balance of the purchase price is then paid once the Contract is completed (at settlement). In the normal course of events, the deposit is held by the deposit holder (usually the real estate agent) until settlement has taken place and then the balance is released to the Vendor after the agent takes their commission and has received confirmation from both parties that settlement has occurred. However, if the Purchaser does not comply with the Contract, for example, by not proceeding to settlement of the Contract, then the Vendor can keep or recover the deposit up to a maximum of 10% of the purchase price.

It has become increasingly common for a Purchaser to request that the Vendor accept a deposit being less than 10%, usually 5% of the purchase price. Examples of instances where a 5% deposit may be requested include a first homebuyer who simply does not have enough cash saved to pay the full 10% deposit or a Company purchasing a commercial property with settlement being a long way off, who does not wish to tie up that much cash for that amount of time.

Whatever the reason, in situations where less than 10% is paid, it is common for the Contract to contain a special condition which provides that if the Purchaser does achieve settlement of the Contract that an amount equal to 10% of the purchase price will become due and payable by the Purchaser to the Vendor.

But are these special conditions enforceable by the Vendor? In three



recent cases the Courts have considered this question and concluded that, in the circumstances of each case, the special conditions were void as a penalty and could not be enforced by the Vendor. Courts have always looked unfavourably on Contracts that contain penalties.

In *Luong Din Luu v Sovereign Developments Pty Limited* (2006) NSWCA 40 and *Ianello v Sharpe* (2007) NSWCA 61 the Court held that the special conditions in those



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cases were considered to be penalties, and hence void, because they required the Purchaser to pay 10% of the purchase price on any sort of default (whether minor or serious) and such a payment would have been grossly excessive and bore no relationship to any genuine pre-estimate of damages that the Vendor might have suffered as a result of the Purchaser's default.

Following the decisions in *Luong Din* and *Ianello*, some commentators thought that these special conditions could avoid being struck down as an unlawful penalty if they were expressed in terms that the parties agree that the deposit is to be 10%; however, it is to be paid by way of instalments, with say 5% payable at exchange of Contracts and the balance of the deposit, a further 5%, being payable on completion together with the rest of the purchase price.

However the recent case of *Boyarsky v Taylor* [2008] NSWSC 1415 seems to demonstrate that these types of special conditions also run the risk of being held void. In *Boyarsky*, the front page of the Contract stated that the purchase price was \$3,311,000.00, the deposit to be \$165,550.00 and the balance of the purchase price to be \$3,145,450.00. Special condition 12 stated:

"The deposit is 10 percent of the price, but payable by instalments, with half the deposit payable on exchange and the balance of the deposit payable on the completion date (as defined in the contract.)"

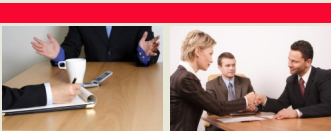
The Purchaser failed to complete the Contract and the Vendor commenced an action for specific



performance of the Contract. During those proceedings, the Court considered whether the provision in the contract requiring payment of a second instalment of the deposit upon the completion date was void as a penalty.

The Court held that even though the special condition was not conditioned on breach or default – that it did not refer to a default by the Purchaser – but simply required payment "upon the completion date" the right of the Vendor to receive such a payment only arose in this case because of a breach of contract by the Purchaser and the provision was a penalty and void.

It would seem that Vendors will need to think very carefully before agreeing to accept less than a 10% deposit as, despite the intentions of the parties encompassed in a special condition in the contract, there is no guarantee that the full 10% of the purchase price will be recovered in circumstances where the Purchaser does not ultimately comply with the Contract.



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