

## ARTICLES

from the Law Institute Journal PROPERTY column

### DEPOSIT RELEASE –why take the risk?

Land deposits must be held in trust pending settlement or prior release (s.24 *Sale of Land Act*). Vendors (and particularly their agents) often seek prior release pursuant to s.27 of the Act. A recent case has raised the possibility that release of the deposit may also have some unexpected consequences for the purchaser's legal rights against the vendor.

Pamamull v Albrizzi (Sales) Pty Ltd [2011] VSCA 260 concerned an attempt by a purchaser to avoid a contract of sale of land on the basis that an encroachment on one boundary constituted a defect in title. The purchaser had purported to rescind the contract shortly prior to settlement, but the vendor had rejected that purported rescission, had in turn rescinded the contract, resold the property at a loss and issued proceedings against the purchaser for forfeiture of the deposit and the loss on resale.

The trial came on for hearing in the Supreme Court but the purchaser was not in a position to proceed. His solicitor applied to withdraw and the purchaser sought an adjournment, which was opposed by the vendor. The purchaser's defence had been based on the partial encroachment ON TO the land sold by an adjoining property constituting an easement over the property sold which should have been disclosed in the Vendor Statement. The failure to disclose was said to justify statutory avoidance by the purchaser. The judge granted the purchaser a short adjournment but then found in favour of the vendor, however the purchaser was given the right to return in two days to show why judgment should not proceed.

The purchaser returned in the company of the inimitable Wikramanayaka SC. who informed the Court that the Vendor Statement argument was 'wrong' and 'of no merit' but that the purchaser had a good defence based on an argument that the partial encroachment OVER adjoining land by the land sold constituted a defect in the vendor's title entitling the purchaser to rescind the contract. That argument was not accepted, essentially as the judge was not satisfied that there was any evidence before him as to this encroachment, and judgment was confirmed.

The purchaser appealed to the Court of Appeal and, in relation to the argument concerning the failure of the judge to grant a longer adjournment, was successful. The Court of Appeal held that it would have been reasonable to grant an adjournment of two weeks to allow the purchaser to retain and instruct new solicitors. However the Court of Appeal decided nevertheless that, as the purchaser's claim had such little chance of success, it would be futile to order a retrial and judgment was confirmed.

The Court of Appeal considered the defect in title argument and the analysis followed the traditional route of starting with *Flight v Booth* (1834) 131 ER 1160 to establish that a substantial error or misdescription in title boundaries may constitute a defect in title such as to justify avoidance. This however depends upon the subject matter of the transaction, requiring reference to the contract of sale, which in turn brings into play any contractual conditions that relate to misdescription. This contract contained what might be described as a traditional 'identity' condition which seeks to forgive any misdescription but which will always be subject to the *Flight v Booth* limitation in relation to a 'substantial' error. The Court of Appeal concluded that the contractual terms forgave a minor error and that the error in this case was 'not of such substantiality as to found an entitlement to avoid'.

There is nothing unusual in this analysis EXCEPT that the Court of Appeal also referred to the fact that the purchaser had agreed to release of the deposit and in doing so 'was deemed to have accepted title' and might thereby be regarded as having 'waived those rights or elected to proceed under the contract.' The proposition was not considered at length but must be taken as a warning to purchasers that consent to release of the deposit may constitute an acceptance of title and thereby prevent any subsequent argument based on a substantial defect in title.

A purchaser who signs a deposit release that includes reference to accepting title will thereby lose the ability to thereafter claim a title defect. Further, signing a deposit release that does not refer to acceptance of title might arguably be deemed to be implied acceptance. Section 27(2)(b) does not provide that a purchaser who releases the deposit thereby accepts title, but it does provide that the deposit release procedure is only available 'where the purchaser has accepted title or may be deemed to have accepted title'. Thus a purchaser who signs a release may face an argument that the purchaser has impliedly accepted that the statutory precondition to release has been satisfied. Whether some all embracing statement to the effect that the purchaser does NOT accept title will save the purchaser is uncertain.

Consenting to release immediately upon sale would be outright dangerous, but consenting at any time prior to settlement would appear to expose a purchaser to an unnecessary risk. Failing to fully inform the purchaser of this risk would constitute professional negligence.