

# YOU AND YOUR PROPERTY

BY RESIDENTIAL PROPERTY LAWYER  
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In previous articles I have discussed the perils of entering into an Agreement for Sale and Purchase without adequate knowledge of exactly what is being purchased. The cases I have discussed have invariably been decided in favour of a developer, notwithstanding that the properties being purchased have varied (to lesser and greater extents) from those described in plans or promotional material. In this article I discuss another form of misunderstanding which can have a substantial impact on a purchaser's ability to settle the purchase of a property.

In a recent decision of the High Court (*Vincent Street Trustee Limited v Mason*) the Court was asked by Mr and Mrs Mason to consider whether or not there was an agency relationship between OPM Financial Solutions, a company who introduced the Masons in 2007 to VSTL (the developer of an apartment complex). The Masons agreed to purchase one of the apartments developed by VSTL "off the plans". The agreement was not conditional upon finance. At the time the Masons signed the agreement, the Masons were under the clear impression that they qualified for finance and that OPM would secure that finance for them.

In late 2009, the Masons were advised that the apartment block was completed and that settlement of their apartment would occur the following month. The Masons' solicitor reminded them of the need to ensure that their finance was in place in plenty of time. It is not clear from the case notes what happened between the solicitor's letter and settlement. On the settlement date the Masons received an email from a company associated with OPM indicating that finance had not been arranged and that OPM had made no progress in respect of arranging it. A separate entity (Sachs and Partners) had been instructed to organise finance on the Masons' behalf. VSTL's solicitors sent a settlement notice to the Masons' solicitors. The Masons continued to seek finance but found that they were unable to secure any funding as they did not meet any lenders' criteria. The Masons

were unable to complete the purchase prior to expiry of the settlement notice.

VSTL ultimately cancelled the agreement and resold the property at a loss. VSTL then issued proceedings against the Masons for the loss suffered as a result of the sale at a reduced price.

The Masons alleged that they believed that OPM and VSTL were acting in concert. The Masons further alleged that the knowledge that finance had not been organised by OPM must have been known to VSTL and that OPM was acting as VSTL's agent. The Masons argued that if such relationship or knowledge could be proved that they would have a defence to VSTL's claim for loss. The Judge colourfully described the Masons' argument as an attempt to "go on a fishing expedition in a pond where there is no trace of fish." The Court held that the Masons had produced no evidence that OPM and VSTL had an agency relationship. The Masons were ordered to pay VSTL for VSTL's losses.

This case highlights the risk of entering into contractual arrangements without being absolutely clear as to your obligations and the obligations of others to you. There is no suggestion that the Masons had any issue with the apartment or with their investment. Their error was that they did not make sufficient enquiries to determine whether they had finance to complete the purchase. They had made assumptions that OPM would deal with these aspects for them and relied upon those assumptions.

I have encountered several situations where clients have been misunderstood the availability of finance for a purchase. Such situations include:

1. purchasing a property off the plans on the assumption that the property will increase in value between the time that the contract was signed and the property was completed, thereby creating equity in the property to meet bank lending criteria. It is dangerous to assume that any property will increase in value during a prescribed time;
2. purchasing a property on the basis that the banks' current lending criteria will



continue to apply at the date that the client will be called upon to settle. Most banks offer a 60 day period during which the finance can be drawn upon. After this time, there is no certainty that finance will continue to be available. I recall advising a client who had agreed to buy a 45m<sup>2</sup> apartment. He met the bank's lending criteria at the time and he entered into the agreement (before obtaining legal advice). When called to settle two years later, he became aware that most major lenders will not lend money against apartments smaller than 50m<sup>2</sup>;

3. confirming a contract on the basis that finance has been obtained without thoroughly checking the conditions of any finance. I have had experience of a lender just two days prior to settlement requiring a valuation and a building report. Any offer of finance will usually be conditional to a lesser or greater degree.

Where a bank acts in a manner that is unfair or unreasonable, there are remedies available to customers of the bank through each banks' complaints service and where the lender is a member of the Banking Ombudsman scheme, through the Banking Ombudsman. Those remedies are only available where a Bank fails to meet its contractual obligations or follow appropriate processes. In my experience, the major banks have very robust documentation which allows them to withdraw funding in the event that anything adverse is detected pertaining to the property.

As always, it is my recommendation that all possible circumstances are considered when entering into contracts for the sale and purchase of land. If there is any doubt, advice should be sought from your solicitor.

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