

Drafting off-the-plan contracts

A step by step guide

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Program

- Introduction
- Contract v. Disclosure Statement
- Taking instructions

First Group Exercise

- Describing the lot

Second Group Exercise

- Foreign Investment Review Board

- Implied warranties

Third Group Exercise

- Disclosure Statements
- Community Management Statement

Fourth Group Exercise

- Staged developments
- Concluding remarks
- Surprise

Morning tea break

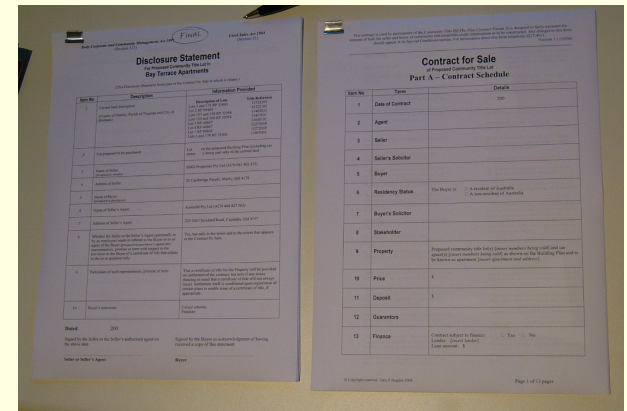
Introduction



- Off-the-plan marketing relies heavily on images
- Those images are not carried over into the contract
- The contract needs to build confidence
- But there needs to be balance between not enough detail and too much detail
- It needs to be “bullet proof”

Contract -v- Disclosure Statement

- Separate -v- combined
- Contract presents as a legal document
- Disclosure Statement presents as an information or marketing document
- Disclosure Statement forms part of the contract (section 215)
- Express statement is still recommended



Taking instructions

- The “next week” problem
- Managing the expectations of the client
- Passing the buck to the client
 - Draft contract with blanks
 - Check-list
- Adopt a task list and timetable
- “Next week” becomes “next month”

First Group Exercise

What are the key contractual issues relating to the deposit?

Key issues relating to the deposit

- Money v. bank guarantee v. deposit bond
- Payees under guarantees and bonds
- Ability to substitute cash
- Money must be held in a trust account
- Choice of stakeholder
- Treatment of interest
- Instalment contracts (the 10% issue)
- Impact of discounts, rebates and penalties
- Should not take effect before settlement

Describing the lot

- Starts with the “**Parcel**” for the proposed community scheme
- The “**Property**” is the proposed lot in that community titles scheme
- Car space/storage area may be part of that lot or an exclusive use area
- Proposed lot refers to a proposed “**Building Format Plan**”
- “**Building Plans**” can also be referred to

Second Group Exercise

Draft the definition(s)
describing an
off-the-plan lot

Parcel definition

“Parcel” means lot 4
on registered plan
12345

Property definition

“**Property**” means the proposed community title lot 5 shown on the **Building Format Plan**, to be known as unit 5, *Ocean View*, 7 Smith Street, Manly, and approximating the unit shown on the **Building Plans**.

Building Format Plan Definition

“Building Format Plan”

means the draft building format plan proposed to be registered in respect of the **Parcel**, being the plan in annexure A.

Building Plans definition

“**Building Plans**” means the proposed plans of the building intended to be subdivided by the **Building Format Plan**, being the plans in annexure B

MORNING TEA BREAK

10.30 to 10.45 am

Please return promptly



Foreign Investment Review Board

- Non-residents must receive approval to buy residential real estate
- Advance approval available for 50% of units (off-the-plan or new and unoccupied)
- Must be 10 or more units
- Non-resident buyer must receive copy of the approval letter
- Annual reporting required
- Beware of privacy policy

Implied warranties

- Cover –
 - Latent or patent defects
 - Defects disclosed in body corporate records
 - Actual, contingent or expected liabilities
 - Liabilities disclosed in body corporate records
- Apply as at date of contract
- Expressed to apply to “proposed lots”
- Probably don’t apply (*Gelski v. Dainford Ltd*)

Implied warranties (continued)

- Warranty as at completion – there are no circumstances likely to materially prejudice the buyer
- Buyer has imputed knowledge
- The “circumstances” warranty certainly applies
- Safeguards –
 - Disclose anything unusual
 - Take care establishing the body corporate

Third Group Exercise

What are the critical dates that need to be taken into account when drafting off-the-plan contracts?

Critical dates

- Settlement date (14 day issue)
- Settlement date (price adjustments)
- Settlement date (“circumstances” warranty)
- Sunset date (3½ year/4½ year issue)
- Re-disclosure date (14 days +)
- Anniversary of scheme establishment
(Powers of Attorney)

Disclosure Statements

- Annual contributions ***reasonably expected*** to be payable (Over what period?)
- Service contractors (include lifts and maintenance)
- Disclose ***terms*** of contracts
- Body corporate assets (purchase or gift)
- Authorized signatory
- Cancellation if material prejudice
 - Up to 3 days before settlement
 - No “***and/or***” problem

Community Management Statements

- Proposed community management statement must be disclosed
- Must be “substantially complete”
- But it may contain “inaccuracies”
- Buyer can cancel if there is a “difference” and material prejudice
- Difficult to reconcile all this??
- Be cautious
 - Use a complete CMS for disclosure
 - Re-disclose if any change



Fourth Group Exercise

Identify circumstances in which a buyer may have a statutory right to cancel an off-the-plan contract

Cancellation rights

- Failure to attach a warning statement
- Failure to attach information sheet
- Failure to comply with Disclosure Statement requirements
- Breach of implied warranties
- Inaccurate Disclosure Statements (coupled with material prejudice)
- A difference between a disclosed CMS and a registered CMS (coupled with material prejudice)

Staged developments – By-laws

- Exclusive use by-law issues
 - All allocations not in first CMS
 - Power of attorney only lasts 12 months
 - Authorized allocations only last 12 months
 - How are future allocations made?
- First CMS must set out all allocations
- Committee consent will then be sufficient (in most cases)
- Alternative – make areas part of the lots

Staged development - Flexibility

- Number, size, shape and location of future lots – use formulas and parameters (“Gateway”)
- Uncertainty about ability to undertake future stages – use “expandable” and “contractible” approach (“Gateway”)
- Secret is in the drafting of the first CMS

Concluding remarks

- Off-the-plan contracts require serious expertise
- No standard form contract available
- Disclosure is a critical aspect
- Early and thorough preparation is the key to adequate disclosure
- Lawyers need to develop the skills to –
 - Manage this preparation aspect
 - Manage the contractual process



Off-The-Plan Contract Forum

- This is an experiment
- Has the potential to help participants lift the standard of off-the-plan contracts
- You are invited to join the “Forum”
- The rules:
 - Use the standard form distributed
 - Advise about problems and suggestions
 - Form will be updated and re-distributed
 - Don't change the wording – use special conditions
- 2 or 3 forms may prove necessary



Thank you for your
attention!

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