

ARTICLE

29 JULY 2011

Transferring deposit monies

Issue

Where a vendor sells various 'off-the-plan' lots to various purchasers, the initial deposit must be paid (subject to a minor exception that is effectively never used) into the trust account of either the vendor's solicitor or the vendor's estate agent and held 'on trust for the purchaser' until registration of the plan. This is required by s 9AA(2) of the *Sale of Land Act 1962* (Vic) (**Act**). However, unlike solicitors, estate agents are not permitted to invest the deposit money into an interest bearing account.

A common issue that arises is where the vendor's estate agent receives the deposit and is then directed to transfer the deposit money to a solicitor who can then invest the money into an interest bearing account.

Legal position

Section 9AA(1)(a)(i) of the Act sheds light on this issue by stating that the deposit money can be paid 'to a legal practitioner, conveyancer or licensed estate agent acting for the vendor'. The use of the conjunction 'or' in this case implies that one, but not more, of the selected entities can hold the deposit money on trust. This proposition was clarified in *Everest Project Developments Pty Ltd v Mendoza & Ors* by Justice Hargrave.

The Act does not authorise the deposit money to be transferred once deposited and any special conditions added to a contract of sale which allow money to be transferred will be unenforceable. This ensures that deposits paid by purchasers of lots in an unregistered plan of subdivision are fully protected at all times.

Contravention

Where a vendor contravenes the provisions of s 9AA of the Act, the purchaser, pursuant to ss 9AE and 9AF, can rescind the contract and have their deposit money returned. In addition, the vendor may be liable for breach of trust or for offences under s 16 of the Act, as well as a broad suite of enforcement provisions under Division 2 of the *Fair Trading Act 1999* (Vic) that are activated by s 48A of the Act.

Advice

If a vendor plans to invest the purchaser's deposit money for an off-the-plan lot, then it is essential to ensure that the money is paid directly to the vendor's solicitor as noted above. Serious consequences arise where money is paid to the vendor's estate agent or conveyancer and later transferred.

Authored by: **Matthew Southwell**, Cornwall Stodart

Want to republish any of this article?

If you would like to republish any part of this article in your staff newsletter or elsewhere please contact our Marketing team on **+61 3 9608 2168**

Disclaimer

This article is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.



For further information please contact:

John Chamberlin, Lawyer
Phone (direct) **+61 3 9608 2121**
Mobile **+61 418 149 4499**
Email j.chamberlin@cornwalls.com.au