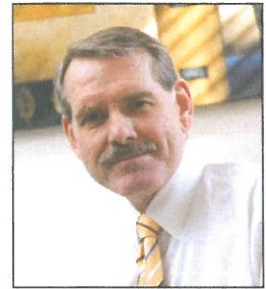


Unit Titles questions I have been asked

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Over the recent past I have received several questions about unit titles matters to do with the agreement for sale and purchase. I thought it might be useful to repeat those questions and answers for the benefit of the profession as a whole.

1. Is a unit title agreement for sale and purchase conditional upon the Pre Settlement Disclosure Statement (PSDS)?

The answer to this question is no. The PSDS is not a condition to the agreement, but a vendor obligation under the statute. So in this case the agent had not collected the deposit from the purchaser which was due "upon unconditional" because it was thought that the PSDS was a condition to the agreement. This had caused some significant delay and concern for the vendor. If the deposit is payable on "unconditional" then it should have been collected when all conditions were met, and not when the agent was aware that the PSDS had been issued by the vendor to the purchaser's solicitor.

2. When can we release the deposit on an unconditional unit title sale?

The answer to this question is in clause 2.4 which sets out a series of actions which will permit the stakeholder (usually the agent) to release the deposit. These triggers are:

- First, the title has passed its 10 working day requisition period without a requisition; and
- Secondly, all conditions have been satisfied; and
- The purchaser's solicitor has confirmed that they have received a PSDS and that it has been received "within the time prescribed in those sections." (The reference to sections in the plural deals with both additional disclosure and pre-settlement disclosure which, if not provided within the requisite timeframe could lead to cancellation of the agreement).

One suggestion is to have the necessary vendor and purchaser request release forms drafted to cater for unit title sales. If a purchaser's solicitor will not confirm that the three limbs have been met to enable you to pay out your deposit to the vendor's solicitor, then you have no alternative but to retain the deposit until you are certain that settlement has occurred. However, notifying the vendor's solicitor that this would be the consequences often solves the problem by the vendor's solicitor and the purchaser's solicitor conferring and getting the matter resolved. A bit of self help here is often useful. You can confirm to the vendor's solicitor that you have a sum ready to release but cannot do so until all the three limbs of 2.4 have been satisfied.

3. There is no unit title for this unit title property. A search is done of the property to find that it is a unit title property, but the vendor has made no mention of unit title at all, and it seems as though there was no unit title organised. You are trying to sell the vendor's unit, which is a block of four, and what can you do about it?

The first point to note is that there will be a body corporate. If it is a unit title, then a body corporate will have come into existence under both the 1972 Act and the 2010 Act at the moment that the plan deposited. Whether the owners collectively act as a body corporate and have various unit title governance measures in place is often another matter all together. It is far more difficult to evade the statutory responsibilities under the 2010 Act than it was under the 1972 Act. Under the 2010 Act there are a host of statutory responsibilities that owners must comply with and run the units as a unit title development and a properly functioning body corporate. In the first instance, you need to explain this to the vendor, and perhaps "shepherd" them towards their solicitor to get further advice. In my view it would not be appropriate to market the property for sale until you are confident that you are going to be able to get a pre-contract disclosure statement ("PCDS") from the vendor.

For example, the Act requires a joint body corporate replacement policy for all buildings. The Act requires them to put in place a long term maintenance plan, and they must have an operating account for collection of levies. Even a most simple unit title development will have some element of common property that the body corporate must maintain, eg the common driveway. If the units are joined together in any way, they must have the replacement insurance policy. Unit owners can only avoid this replacement policy where all units stand alone. This exemption applies to very few unit title developments.

To commence marketing and selling the unit before you know you are going to get a PCDS has potential risks. You can present the vendor with a standard form (either your standard form, or the one off the DBH website). You can invite the vendor to authorise you to get the vendor's solicitor to complete the form. If you come to a point where the vendor simply refuses, then you have choices. The choices are either:

1. To withdraw from the sale of the property and give the vendor the reasons; or
2. Seek an indemnity from the vendor.

You need to explain to the vendor the possible consequences of selling without a PCDS.

4. Can you make a contract conditional upon receiving the PCDS?

I have seen this as a provision in several contracts for the sale of unit title property. I do not believe that you can make a unit title property agreement conditional in this way. I say this, because it is directly in breach of, and contrary to the terms of Section 146 of the Unit Titles Act which states:

"Before a buyer enters into an agreement for sale and purchase of a unit the seller must provide a disclosure statement (PCDS) to the buyer."

So, if a buyer signs a contract, conditional upon receiving the PCDS, it is too late, the buyer has signed and Section 146 would have been breached. Also it would also appear to offend against

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