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Update Summary

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CONVEYANCING MANUAL QUEENSLAND

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UPDATED COMMENTARY

Author Professor Sharon Christensen has added or updated the following annotations:

Chapter 8 – Duty

Transfer duty concession for first home buyers

From 9 June 2024 the threshold ceiling for the concession on transfer duty for a first home buyer will be lifted for houses and vacant land:

- Houses – from $500,000 to $700,000
- Vacant Land – from $250,000 to $350,000

The changes are explained at **[ND.1.130] State Government Budget FY25 announcements affecting property** and the commentary in Chapter 8 is updated.

Chapter 2 Standard Contract, Chapter 3 Obligations prior to contract, Chapter 4 Preparation of the contract and Chapter 7 Inquiries

Fire Services Act 1990

From 1 July 2024 the *Fire and Emergency Services Act 1990* (Qld) was renamed the *Fire Services Act 1990* (Qld) by the *Disaster Management and Other Legislation Amendment Act 2024* (Amending Act). The Amending Act gives effect to a review of the disaster management structures in Queensland. New smoke alarm requirements for caravans and motor homes were added and as a consequence the smoke alarm provisions of the Act were also renumbered.

The definition of smoke alarm requirement now appears in s 147W *Fire Services Act 1990* (Qld). The substance of the definition has not changed. The substance of a seller's obligations to instal compliant smoke alarms (s 147Z) and to give the buyer a notice about whether the smoke alarms complying with this division are installed in any dwelling on the land (s 148I) have not changed. The commentary in Chapters 2 and 3 are updated to reflect the change of name and new section numbers.

There is no plan to issue a new version of the REIQ contract at this time. Note clause 10.9(3) which will operate to deem the definition of 'smoke alarm requirements' in clause 1 to refer to the new section.

Chapter 1 General contract law

Form of Memorandum

The decision in *Piety Developments Pty Ltd v Cumberland City Council* [2024] NSWCA 173, [131] – [137] is digested in relation to emails as a satisfactory memorandum in writing. In the case, minutes of a council meeting where a decision to enter a contract was

recorded, but a motion to rescind the decision was lodged prior to signing the minutes, was held not to satisfy the requirements for a memorandum under the equivalent section in NSW.

The decision in *PF 473 Pty Ltd v Qasim* [2024] NSWSC 874 is also digested as authority for a typed name being equivalent to a signature. In this case there was a course of conduct of dealings by email so a typed name was considered reliable, see **[1.300] Form of the memorandum**.

Chapter 4 Preparation of the contract

Unregistered covenants between landowners

In *Bellevue Station Pty Ltd v Consolidated Pastoral Company Pty Ltd* [2024] QCA 47 the Court of Appeal considered the enforceability of an agreement between two landowners in relation to land use and a boundary fence after a change of ownership. The agreement included clause 6 which provided for the new owner (Bellevue) to negotiate an agreement on the same terms with the other landowner (Consolidated). Consolidated refused to enter into a new agreement and erected a new boundary fence. The Court of Appeal held that:

A. There was no express or implied promise by Consolidated to enter into a new agreement and in any event the phrase 'enter into a similar arrangement' was too ambiguous to be enforced and was in reality an agreement to agree.
B. The agreement was not a 'covenant relating to any land' under s 53(1) *Property Law Act 1974*. Under the agreement there was a promise to allow the previous owner to use land without fencing which the court in essence held was a personal right and not a covenant relating to the land owned by Bellevue; and
C. The purported assignment of the rights under the agreement was not entered into until after Bellevue acquired the land. As the seller was no longer the owner their rights under the agreement ceased and there was nothing left to assign.

Key points for buyers of property where there are unregistered arrangements between the seller and adjoining landowners:

1. Unregistered agreements need to be carefully scrutinised prior to contract to determine if they are personal to the parties or are capable of running with the land.
2. If the agreements are personal, agreement need to be reached in relation to the transfer of the rights under the agreement to the buyer. If personal, the agreement will need to be novated and if not personal, the rights may be assignable. Any assignment should be effected prior to settlement.

3. It will be rare for an agreement between landowners to be categorised as a covenant relating to land unless the agreement clearly provides for it to run with the land and contains provision for ongoing rights and obligations irrespective of the ownership of the land. Only in this case will rights under the agreement transfer without the need for an assignment. It should be noted that any positive obligations will not transfer to a new owner unless the new owner expressly agrees to be bound, see **[4.650] Are there any unregistered encumbrances or statutory encumbrances over the land?**.

Drafting special conditions for standard terms contracts

In *OF Beenleigh Pty Ltd v Khalaf Management Pty Ltd* [2024] QSC 96 the parties (Kalaf and OneFin) entered into a put and call option for a development site with a due diligence period. Upon satisfaction or waiver of due diligence there was a 12-month option period. An initial deposit of $2000 was paid and a second payment of $273,000 upon satisfaction of due diligence which was notified on 31 May 2022. Upon exercise of the option the Security Deposit of $275,000 would be deemed to be the deposit under the contract of sale.

On 29 May 2023, OneFin wrote to Kalaf advising them of a resumption of part of the land and that the proposed resumption was not disclosed in the contract annexed to the Option, which if exercised could be terminated under clause 21.1(b) for the failure to disclose and the deposit would be repayable. OneFin had discovered the resumption when DTMR wrote to them on 24 April 2023.

The option was exercised on 31 May 2023 by OneFin and OF Beenleigh nominated as the buyer reserving all rights under the contract and at law.

On 23 June 2023, OF Beenleigh again wrote to Kalaf reiterating the points on the letter of 29 May 2023 and reserving its rights to terminate the contract.

On 7 July 2023, Of Beenleigh terminated the contract and demanded repayment of the deposit. Kalaf refused to pay and OF Beenleigh lodged a caveat.

Two issues:

a. Was the deposit refundable only if the contract is terminated for the breach of the seller?
b. Did the buyer waive the right to terminate under clause 21.1(b)?

Deposit

Clause 2.2 of the Option Deed provided:

> The Security Deposit once paid may be released to the Seller and is non-refundable, unless this deed is terminated due to the Seller's breach, in which case the Security Deposit (or so much of it that has been paid) must be immediately refunded to the Buyer.

In accordance with the deed the security deposit had been released to the Seller.

Under the contract formed on exercise of the option, the deposit was stated at $275,000 in the Reference Schedule with a reference to special condition 40.

Under Standard Contract, clause 3 provided that if the contract was terminated pursuant to a range of clauses, including cl 21.1, the deposit was fully refundable to the buyer.

Special condition 40 provided:

> 40.1 **Deposit**
>
> (a) The parties acknowledge and agree that pursuant to the terms of the Option Deed, the Deposit has been fully paid as required by this contract, on or before the Contract Date.
>
> (b) If this contract comes to an end as a result of the Seller's breach, then the Deposit (or so much of it that has been paid) must be promptly refunded to the Buyer."

The issue for the Court was whether on a proper construction of the contract the deposit was refundable. The court decided that if the contract was validly terminated under clause 21.1 the deposit should be returned to the buyer for the following reasons:

- Upon exercise of the option, the security deposit under the option deed disappeared and became the deposit under the contract. Whether the deposit should be returned is determined by reference to the provisions of the contract;
- There was no inconsistency between the operation of clause 3.5 which operated where there was non-disclosure under cl 21.1 and clause 40 which applied to breach.
- The court did not accept the argument that the special condition should override the standard condition where the standard condition was not deleted or expressly varied, see **[4.950] Special conditions**, **[4.1850] Purpose of special conditions.**

Chapter 10 After completion

Unlicensed Real Estate Agent seeking commission

In *Creative Academy Group Pty Ltd v White Pointer Investments Pty Ltd* [2024] NSWCA 133 the NSW Court of Appeal considered by a claim by a principal for recovery of commission paid to an unlicensed agent engaged to source sites for childcare centres. The agent operated in both NSW and the ACT, but the court held that in relation to the NSW properties the agent did not act as a real estate agent. In relation to the ACT properties the agent did engage in activities as a real estate agent, but the Court of Appeal refused the principal's claim for recovery in restitution after considering the operation of the relevant legislation. Similar to Queensland a real estate agent must be licensed in both NSW and the ACT. Under the *Property and Stock Agents Act 2002* (NSW), s 8 and 9 and the *Agents Act 2003* (ACT), s 23 an agent is *not entitled to bring*

any proceeding to recover any commission. The Court of Appeal concluded that upon a construction of the legislation and having regard to public policy, the retention of commission paid by an agent was not required to be returned. A claim in restitution on the basis of the total failure of consideration failed as services had been performed and a claim for monies paid under a mistake as to whether the agent held a licence was not causative of the payment of commission.

In contrast the *Property Occupations Act 2014*, s 89 provides that an unlicensed agent may not '*sue for, recover or keep a reward or expense*' making it clear that an agent is required to disgorge the commission paid, see **[10.210] Entitlement to commission**.

Chapter 19 Mortgages

Effect of transfer of a mortgage

Cameron v Arcobaleno Pty Ltd [2024] QSC 111 is also added to the commentary at [19.170] as a further example of the application of the principles in *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81, where the High Court concluded that the registration of the transfer of a mortgage did not transfer the right to recover the original debt contained in a separate loan agreement. In *Cameron*, a deed entered into between the original mortgagee and transferee was held by Cooper J to effectively assign the debt to the transferee, see **[19.170] Transfer of a mortgage**.

Recovery of possession by mortgagee

The decision in *Cameron v Arcobaleno Pty Ltd* [2024] QSC 111 is added to the commentary at [6.8340]. The decision examines the operation of s 26, 35 and 36 of the *Limitation of Actions Act 1974* (Qld) where a loan is repayable on demand. Where a debt is repayable on demand, it is accepted that an action to recover the debt accrues from the date of the advance. This means the 12 year limitation period for recovery of the debt commences on the date of the advance, but may be extended by the operation of ss 35 and 36. On the facts of the case, Cooper J concluded that subsequent acknowledgements in writing appeared to satisfy the requirements of those sections, see **[19.320] Entry into possession**.

Chapter 22 Forms

Request for fire safety report, see **[22.820]**.