FOLEY'S LIST

SALE OF LAND: ENFORCING RIGHTS AND REMEDIES

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ENFORCING RIGHTS AND REMEDIES

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BY

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Introduction.

A speaker dealing with this topic in an hour has possible methods of approach. One would be to simply follow a text-book, which would be unhelpful because the audience could easier read the book. Another would be to go through recent cases dealing with each case in order – this would be more helpful but can be confusing because it involves jumping backwards and forwards between different legal doctrines. It is thought, however, that the best approach, is to deal with legal doctrines arising in recent Victorian Supreme Court cases in the order in which they would logically arise in a conveyancing transaction. The order is –

1. Section 32 Statements:
2. Conditional contracts.
3. Categories of breach of contract and examples of breaches not justifying termination.
4. Breach of contract justifying termination, and anticipatory breach.
5. The mechanics of settlement.
6. The innocent party not terminating, time ceasing to be of the essence and notices to complete.
7. Notices of default.
8. Termination by acceptance of repudiation where no effective notice of default.
9. Loss of the right to rescind by affirmation or election.
10. The effect of back-up notices to complete or of default.
11. Caveats by purchasers.
12. Specific performance
13. Damages.
14. Vendor's duty on resale.
15. Calculation of vendor's loss if property not resold.
16. Avoidance by purchaser for breach of terms contract conditions.
17. Rescission by purchaser related to a sale off the plan.
18. Relief for purchasers arising from pre-contractual statements – fraudulent misrepresentation.

19. Relief for purchasers arising from pre-contractual statements – misleading or deceptive conduct.
20. Misleading or deceptive conduct by statement.
21. Misleading or deceptive conduct by silence.

1. Section 32 Statements.

What tenancy issues are to be disclosed? In ***Vouzas v Bleake House Pty Ltd*** [2013] VSC 534 a company leased a hotel from Bleake House for 15 years from 2006. Later that year the lessee's interest was assigned to the Collingwood Football Club. In August 2008 Collingwood announced that it had signed Heads of Agreement to sell the hotel business with 6 – 12 months settlement, subject to conditions. In October Vouzas received draft copies of the Vendor's Statement and proposed contract of sale. The Vendor's Statement incorporated a copy of the lease and the assignment, and a statement by the vendor that to the best of its knowledge there was no existing failure to comply with the terms of any restriction. Vouzas then saw public representations by the vendor that there was a long lease to an "AAA" tenant and as to annual rental income and annual rental increases. He was unaware of the Heads of Agreement or of the "consent" by Bleake House to the proposed assignee from Collingwood, but knew of the possibility that Collingwood might enter such a transaction. Bleake House entered a contract of sale to Vouzas. Subsequently Collingwood entered formal contract of sale of business containing the same conditions as those in the Heads of Agreement. Section 32(2)(b) of the Sale of Land Act required "a description of any easement, covenant or other similar restriction affecting the land … ". Did this require disclosure of a lease or related documents? Macaulay J. –

(a) inclined to the view that a lease had to be disclosed, but found it unnecessary to decide the question because in any event it was not false to say that the property was leased to Collingwood and the vendor was not required to disclose more – the uncertain nature of the proposed assignment from Collingwood did not sensibly falsify the fact that the land was leased to Collingwood;
(b) held that a vendor was not obliged to supply information regarding: any conditional agreement to assign a lease; any assignment of lease; and any consent by the freehold owner to the assignment;
(c) would if necessary have excused the vendor under s. 32(7).

Comment – The Sale of Land Amendment Act 2014 substitutes a new s. 32 from 1 October 2014. Sections 32C(a) and 32K(4) would not alter this result.

In ***ZX Group Pty Ltd v LPD Corporation Pty Ltd*** [2013] VSC 542 the only breach of s. 32 was non-disclosure of a land tax charge registered on title approximately 4 weeks before the contract (same - new s. 32A(b)). Other alleged breaches, dismissed by the court, were:

omission of a planning permit, although the underlying VCAT determination and orders were included - s. 32(3)(ba)(iv) only required a statement of the content of a planning permit if there was a staged subdivision (which this was not), and sufficient town planning evidence had been provided (the new s. 32C(d) appears to contain no requirement to disclose a planning permit);

misstatement of the address of the land – not a requirement of s. 32;

a statement of the outgoings as not exceeding a particular figure – in the circumstances correct (new s. 32A(c)(ii) – same);

omission of a particular EPA Register extract - whilst s. 32(2)(e) (new s. 32D(a)) might be regarded as requiring the inclusion of an EPA Register extract, which provided that the site was listed on, or was in the vicinity of a site listed on the EPA Priority Sites Register, the particular extract was not relevant here;

omission of reference to an unregistered mortgage - there was no obligation to disclose a mortgage to be discharged before or at settlement (same - new s. 32A(a))

The vendor was excused under s. 32(7) for not disclosing the land tax charge, because –

(a) It was irrelevant whether it had acted dishonestly in a matter extraneous to s. 32;

(b) the charge was only registered shortly before the contract and the Vendor's Statement did disclose all relevant details about the land tax arrears and noted the vendor’s responsibility to pay them, and the vendor left all legal aspects of the sale to its solicitor;

(c) the vendor acted reasonably because its director believed that the land tax arrears were not significant, because they were to be paid out of settlement

monies, and any negligence by its solicitor concerning non disclosure of the charge was not to be attributed to the client;

(d) the vendor ought fairly to be excused; and

(e) the purchaser was in substantially as good a position as if all the relevant provisions of s. 32 had been complied with, chiefly because the vendor had before the date of settlement of the contract undertaken to the Commissioner of State Revenue to collect the outstanding land tax at the settlement of the sale.

Under the new equivalent of s. 32(7) (s. 32K(4)) the result would be the same.

2. **Conditional contracts.**

In ***Putt v Perfect Builders Pty Ltd*** [2013] VSC 442 the contract was subject to a particular lender approving a loan of $475,000 by a particular date. The purchaser was required (General Condition 14.2) to do everything reasonably required to obtain approval of the loan. They applied for a loan for $476,000. The application was declined on the ground that the loan had failed to meet all the necessary requirements for approval because "Valuation confirms the property is unacceptable for AFG to consider". The purchasers failed to obtain a refund of the deposit because they failed to establish compliance with General Condition 14.2. There was insufficient evidence of: an application for a loan of $475,000, or; the purchasers doing everything reasonably required to obtain approval of such a loan.

3. Categories of breach of contract and examples of breaches not justifying termination.

The law derived from ***Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*** (2007) 233 CLR 115 is –

(a) The question whether a term in a contract is a condition or a warranty, ie, an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been

assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.

It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and the commercial purpose it served, that determines whether a term is "essential".

(b) However, non-essential terms or promises can in some circumstances be "intermediate" – ie a breach of a nonessential term can be serious in terms of its consequences or "as going to the root of the contract" or as depriving the other party of a "substantial part of the benefit to which [it was] entitled under the contract".

(c) The innocent party can terminate for breach of a condition/essential term or for a serious breach of a non-essential term. Otherwise the remedy if any is damages.

An example of a non-essential term or an intermediate term not founding termination is in ***ZX Group Pty Ltd v LPD Corporation Pty Ltd*** [2013] VSC 542. The vendor warranted that it had not previously sold the land (General Condition 2.3(d)). However it had previously entered a contract to sell the land to another (friendly) party under which no money had been paid and the time for completion had passed. Before the time for completion of the second contract it was common ground that the previous contract was at an end and the previous purchaser withdrew its caveat. Nonetheless the second purchaser served a rescission notice based on breach of this General Condition.

Williams J held:

(a) General Condition 2.3(d) was not an essential term: the vendor's principal obligation was to transfer an unencumbered estate in the land, at settlement, and before this it could take any necessary steps to ensure that that principal obligation would be met. There was no common intention that the relevant part of general condition 2.3(d) should be an essential term;

(b) If this General Condition was an intermediate term then to justify termination the breach must effectively deprive the purchaser of a substantial part of the benefit to which it was entitled under the contract – this test was not satisfied because the principal benefit for the purchaser under the contract was the transfer of an unencumbered title at settlement.

4. Breach of contract justifying termination, and anticipatory breach.

Qin v Smith (No. 2) [2013] VSC 476.

The contract of sale was dated 25 July with settlement due on 24 September 2012. The Vendor's Statement, also included in the contract, disclosed that the property was leased until 4 January 2013. However, under heading "Lease (General Condition 1.1)" the purchaser was at settlement entitled to vacant possession, unless the words 'subject to lease' appeared in the appropriate box. The box contained the words "not applicable". And General Condition 10.1 provided that at settlement the purchaser must pay the balance of the purchase price and the vendor must give either vacant possession or receipt of the rents and profits in accordance with the particulars of sale.

Before the settlement date the vendor told the purchaser that the tenants had refused to vacate early and vendors could not give vacant possession at settlement. The purchaser's solicitors informed the vendors' solicitors that the purchaser was willing and able to settle on that agreed date, provided vacant possession was given at settlement. Because the vendors stated they would not give vacant possession the purchaser did not attend settlement (but also did not terminate the contract). Derham AsJ held:

(a) The fact that the contract incorporated a Vendors' Statement which disclosed a lease expiring after settlement did not affect the obligation to provide vacant possession under General Condition 10.1. The General Conditions also took precedence over the Vendors' Statement.

(b) The purchaser's obligation to pay the balance of the purchase price and the vendors' obligation to give good title and vacant possession were mutually dependant and concurrent. Each party's obligation was conditional on performance by the other.

(c) By stating in advance that they would not give vacant possession the vendors committed an anticipatory breach of the contract. However, repudiation by way of anticipatory breach did not put an end to the contract unless the other party elected to accept it and rescind the contract – in which case the innocent party can maintain an action for damages for the anticipatory breach. The innocent party may continue to treat the contract as on foot and hold the repudiating party to the performance of his obligations. If those obligations remain unperformed when the time for performance arrives, the anticipatory breach will be converted into an actual breach.

(d) Accordingly the vendors' refusal to provide vacant possession was an anticipatory breach and excused the purchaser from tendering the balance of the purchase price on the settlement day. Alternatively, General Condition 10.1 (which included the obligation to give vacant possession) was an essential term of the contract and the only substantial performance available was literal performance by giving vacant possession.

(e) Incidentally –

(i) the purchaser was not in breach by not tendering the balance of purchase price when the tenants subsequently vacated;

(ii) subject to the contrary agreement of the parties "settlement day" means 10 am - 4 pm - General condition 10.3. Thus in ***Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd*** [2014] VSC 57, where settlement was fixed for 3.30 pm, the purchaser was in default from that time – the argument that settlement could have occurred any time up to midnight was invalid.

A recent example of a purchaser having the right to terminate the contract, because of the vendors' insistence on an untenable position, and exercising that right, is ***Patmore & Anor v Hamilton*** [2014] VSC 275. The contract included standard General Condition 24 as to loss and damage before settlement, inter alia requiring the vendor to deliver the property in the same condition as on the day of sale, except for fair wear and tear, did not permit purchaser to delay settlement for breach of this requirement, but established a mechanism for the purchaser to nominate an amount up to $5,000 to be diverted at settlement to a stakeholder to be subsequently argued over. Water damage occurred after date of contract, which Digby J held to be outside fair wear and tear, the vendor refused the purchaser's attempt to divert $2,640 in part by not joining in nominating a stakeholder, and purportedly rescinded for the purchaser's breach. The purchaser subsequently successfully rescinded.

5. The mechanics of settlement.

In ***Qin*** Derham AsJ refers to the purchaser's obligation to pay the balance of the purchase price and the vendors' obligation to give good title and vacant possession being mutually dependant and concurrent. The mechanics of a normal settlement meeting were analysed by Dixon AJ in ***Settlement Group Pty Ltd v Purcell Partners*** [2013] VSCA 370 at 115 – 121. His Honour held –

(a) The implicit condition that operates initially at settlement is that this exchange of documents and cheques is to enable each party to determine whether what it has received corresponds with its contractual entitlement so it is content to perform its own obligations.

(b) Each party is entitled, if not satisfied that what it received is in accordance with its entitlements on completion of the relevant contract, to call off, or postpone, the settlement. In that event, all parties return what was received and receive back what was conditionally exchanged, and remain in the status quo prior to the settlement.

(c) The settlement is completed when every party indicates that it is satisfied that the concurrent and mutually dependent obligations have been satisfactorily performed by each other party.

6. The innocent party not terminating, time ceasing to be of the essence and notices to complete.

As already noted, in ***Qin v Smith (No. 2)*** [2013] VSC 476 the purchaser wanted to go on with the contract and so it remained on foot despite the repudiatory conduct of the vendor. Derham AsJ stated the following law -

(a) If the contract was kept on foot the repudiating party may, upon giving reasonable notice, withdraw the repudiation and complete the contract and the innocent party remained bound by the contract, enabling the repudiating party to take advantage of any breach by the (previously) innocent party or any supervening event which would discharge the previously repudiating party from liability. However the innocent party did not commit a breach if the repudiation by the other party made it futile or pointless to attempt to perform an obligation.

(b) On the settlement day passing without the purchaser electing to rescind, time ceased to be of the essence until it was made essential again by a party giving reasonable notice of intention to complete the contract, typically by a notice to complete. If a purchaser responds to a notice to complete by tendering the appropriate sum, the vendor could not refuse to settle: ***Naval and Military Club v Southraw Pty Ltd & Anor*** [2008] VSC 593 at [24].

However, despite a late settlement time may not cease to be of the essence. In ***Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd*** [2014] VSC 57 the amended contract provided for settlement on 18 December 2010. The

vendor's solicitors appointed 20 December 2010 for settlement but the purchaser's nominee did not settle. Its solicitor, however, requested an extension to 17 January 2011. On 12 January 2011 the vendor's solicitor advised the nominee's solicitor that the vendor agreed to settle on 17 January, on certain conditions, and appointed 3.30 pm on that day for settlement. The nominee's solicitors agreed. The nominee then again did not attend settlement.

Counsel argued that what occurred on 12 January was conditional and insufficient to reinstate time as being of the essence. Garde J, however, held that time had never ceased to be of the essence - in a contract where the parties have stipulated that time is of the essence, a mere extension of time where a new date is substituted for the agreed date does not result in time ceasing to be of the essence.

A notice to complete must give a reasonable time. In ***ZX Group Pty Ltd v LPD Corporation Pty Ltd*** [2013] VSC 542, the agreed settlement date of 3 December 2010 having passed, the vendor gave a notice to complete which the purchaser's solicitors received on 15 February 2011 requiring completion by 21 February and stating that time was now relevantly of the essence. The purchaser did not comply. Williams J held that time had ceased to be of the essence after the December settlement date, but that the February notice did not make it again of the essence because of not giving a reasonable time to comply – there must be strong evidence to justify a notice allowing for less than 14 days for completion of a contract for the sale of land. Accordingly a subsequent rescission notice based on this notice to complete was ineffective.

As noted above, Derham AsJ in ***Qin*** stated that time was again made of the essence "typically" by a notice to complete. An example of time being again made of the essence by other means is ***Burke and Riversdale Road Pty Ltd v Gemini Investments Pty Ltd*** [2003] VSC 33. Settlement was fixed for 1 November 2002 but this date passed. On 10 January the vendor gave a 14 days notice of rescission. Nettle J held that this notice did not have the effect of bringing the contract to an end, because time had ceased to be of the essence, and time could not again be made to be of the essence without reasonable notice first being given, but that this failed notice of rescission had the effect of once more making time of the essence: it comprised a demand for payment of the purchase price, within a reasonable period of time, coupled with a warning that, failing compliance, the vendor would treat the contract as at an end.

7. Notices of default.

Although the relevant standard General Conditions are well – known it is easier to discuss this topic by setting them out -

"27.1 A party is not entitled to exercise any rights arising from the other party's default, other than the right to receive interest and the right to sue for money owing, until the other party is given and fails to comply with a written default notice.

27.2 The default notice must:

(a) specify the particulars of the default; and

(b) state that it is the offended party's intention to exercise the rights arising from the default unless, within 14 days of the notice being given—

(i) the default is remedied; and

(ii) the reasonable costs incurred as a result of the default and any interest payable are paid.

28. Default not remedied

28.1 All unpaid money under the contract becomes immediately payable to the vendor if the default has been made by the purchaser and is not remedied and the costs and interest are not paid.

28.2 The contract immediately ends if:

(a) the default notice also states that unless the default is remedied and the reasonable costs and interest are paid, the contract will be ended in accordance with this general condition; and

(b) the default is not remedied and the reasonable costs and interest are not paid by the end of the period of the default notice.

28.3 If the contract ends by a default notice given by the purchaser:

(a) the purchaser must be repaid any money paid under the contract and

be paid any interest and reasonable costs payable under the contract; and

(b) all those amounts are a charge on the land until payment; and

(c) the purchaser may also recover any loss otherwise recoverable.

28.4 If the contract ends by a default notice given by the vendor:

(a) the deposit up to 10% of the price is forfeited to the vendor as the vendor's absolute property, whether the deposit has been paid or not; and

(b) the vendor is entitled to possession of the property; and

(c) in addition to any other remedy, the vendor may within one year of the contract ending either:

(i) retain the property and sue for damages for breach of contract; or

(ii) resell the property in any manner and recover any deficiency in the price on the resale and any resulting expenses by way of liquidated damages; and

(d) the vendor may retain any part of the price paid until the vendor's damages have been determined and may apply that money towards those damages; and

(e) any determination of the vendor's damages must take into account the amount forfeited to the vendor.

28.5 The ending of the contract does not affect the rights of the offended party as a consequence of the default."

Victorian Economic Development Corporation v Clovervale Pty Ltd and Others [1992] 1 VR 596 is a reminder that these General Conditions are not exhaustive. The innocent party has the general right to sue the defaulting party for damages for breach of the contract. Accordingly, although the rights of the parties are to be determined consistently, and not inconsistently, with these conditions, the innocent party is not bound to pursue one of them or no other remedy. Thus, for example, the vendor is not obliged if suing for damages, to sue within a year of the date of rescission – however if the vendor does act within these General Conditions then it will obtain their benefits (eg under 28.4(d)) which may not be available at general law.

Recent authorities on the form of notices include –

(a) Generally: ***U108 Pty Ltd v Sing Fan & Ors*** [2010] VSC 12.

(b) A notice can be effective, despite the inclusion of a requirement not authorised by the contract, if the notice sufficiently specifies at least one default of which rectification is required by the contract: ***Burke and Riversdale Road Pty Ltd v Gemini Investments Pty Ltd*** [2003] VSC 33;

(c) A notice may be effective notwithstanding that it specifies an excessive amount as payable - the party giving the notice cannot establish default in an any amount greater than the sum which is due but can establish default in respect of so much of the amount specified in the notice as is due: ibid;

(d) General Condition 27 assumes the existence of a default which could be cured. However a warranty, as to the happening of a prior event, eg that the vendor had not previously sold the land, could not later be remedied. Accordingly a default notice based on this was not valid: ***ZX Group Pty Ltd v LPD Corporation Pty Ltd*** [2013] VSC 542. Her Honour did not give further guidance – but quare the correct course in these circumstances is, if the breach is of an essential term or a serious breach of an intermediate term, simply to write accepting the repudiation.

8. Termination by acceptance of repudiation where no effective notice of default.

A foundational case is ***Nund v McWaters*** [1982] VR 575. The contract was made in 1969, the price was $16,900, a deposit was paid, and the balance was payable by weekly instalments, with a final balance payable 5 years from the date of the contract. Time for settlement was extended to September 1976, an invalid rescission notice was served, and on 23 February 1977 the vendor gave a notice saying that the contract was rescinded. The vendor succeeded notwithstanding the invalid rescission notice. The Full Court upheld the argument that the conduct of the purchasers with respect to their obligation to pay the balance amounted to a refusal to be bound by the contract: the balance was unpaid five months after the extended date for settlement notwithstanding warnings; and the purchasers should be taken to have repudiated the contract by when the notice of February 1977 was given.

The Full Court reiterated: "Where the vendor elects to bring the contract to an end because it has been repudiated by the purchaser it is not necessary for him to give the notice required … ". Thus in ***Burke and Riversdale Road Pty Ltd v Gemini Investments Pty Ltd*** [2003] VSC 33 the vendor gave a 14 days notice of rescission which (as noted above) was ineffective to rescind the contract but effective to once more make time of the essence. The purchaser's failure to pay the price within the time set in that notice constituted a repudiation of the contract entitling the vendor to rescind by accepting the repudiation, which a letter of the vendor's solicitor was construed to do.

In ***Amanatidis v Syed & Anor*** [2009] VSC 350 Hansen J unheld the action of a vendor who, without prejudice to its argument that it had validly rescinded pursuant to a notice, wrote stating that it rescinded by accepting the purchaser's repudiation by not paying the residue of the purchaser price on the due date.

Comment: There is some risk in terminating a contract by acceptance of repudiatory conduct, and accordingly if in doubt you should always serve a notice and keep rescission for repudiatory conduct without a notice in reserve. If the person purportedly making the acceptance of repudiatory conduct is wrong, ie there has been no repudiatory conduct by the other party, the purported acceptance is itself a repudiation which the other party can then accept to terminate the contract.

9. Loss of the right to rescind by by affirmation or election.

Affirmation, election and estoppel overlap.

Affirmation. A right to rescind may be lost by conduct consistent only with an intention to affirm the contract – as noted in paragraph 4 above in the discussion of ***Qin v Smith (No. 2)*** an innocent party may continue to treat the contract as on foot and hold the repudiating party to the performance of his obligations. Examples of arguable affirmation arose in the long chain of facts in ***ZX Group Pty Ltd v LPD Corporation Pty Ltd*** [2013] VSC 542. The vendor falsely warranted that it had not previously sold the land (General Condition 2.3(d)). It was argued by the vendor that, assuming (contrary to the conclusion of Williams J) that this breach gave the purchaser the right to rescind, a without prejudice letter by the purchaser's solicitors concerning possible contract extension, and another letter inter alia seeking evidence of cancellation of the previous contract, were affirmatory: this argument was rejected as the letters were not consistent only with the intention to affirm the contract. On the other hand, Williams J held that the vendor's subsequent notice to complete denied it the opportunity to accept possibly repudiatory conduct by the purchaser.

Election. Election is a choice between rights which the elector knows he or she possesses and which are alternative and inconsistent rights. Two situations occurring at settlement illustrate the law.

The first situation is that a vendor becoming entitled to rescind for non-payment of purchase money upon the stipulated date who does no more than give the purchaser the opportunity to pay within a limited time thereafter is not thereby electing not to rescind for non-payment on the due date: ***Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd*** [2014] VSC 57 following ***Nund v McWaters*** [1982] VR 575,

The second situation occurred in ***Qin v Smith (No. 2)*** [2013] VSC 476. The contract provided for vacant possession on settlement on 24 September 2012. The contract disclosed that the purchaser had a solicitor. The chronology then was –

Early August 2012	Agent tells purchaser that tenants had refused to vacate early and vendors could not give vacant possession on the settlement day, and that the purchaser could either cancel the contract or accept the property subject to the lease. The purchaser did not want to do either, but thought she had no other choice.
7 – 13 August	The purchaser, believing that she had only the choice previously stated by the agent, states that she would settle in accordance with the contract but subject to the lease. In

	particular, she sent a text message on 11 August stating "I would still like to take the property".
14 August	Purchaser's solicitor informs purchaser and agent of purchaser's right to vacant possession and that she was not required either to vary the contract or cancel it.

Derham AsJ held that the purchaser had not elected to settle on the due date subject to the lease. The text message of 11 August 2012 was not an unequivocal election between inconsistent rights. Even if it was the law that a person in the position of the purchaser should be taken to know her contractual rights, this contract did not clearly lay out her rights, and what was required in this case was knowledge of the kind only available with the advice of a solicitor. The judge described as "extraordinary" the submission that the purchaser elected between inconsistent rights when only two of the three rights were presented to her by an agent who had by-passed her solicitor.

An election argument was upheld later in the same case: his Honour held that the subsequent action of the vendor in writing agreeing to complete the contract according to its terms, and withdrawing a notice of default and rescission, amounted to unequivocal waiver by election of any right to rescind.

Election can also defeat a claim for rescission based on fraudulent misrepresentation, but not one based on breach of statutory misleading or deceptive conduct provisions. This is illustrated below in the discussion of ***ZX Group Pty Ltd v LPD Corporation Pty Ltd*** [2013] VSC 542 under those respective topics. Confining the current discussion to fraudulent misrepresentation, in ***ZX Group*** the fraudulent misrepresentation was that the vendor had not previously sold the land, repeated in a General Condition. However Williams J held that the purchaser had not, on the basis of this misrepresentation, rescinded the contract. It had elected to pursue its contractual remedies for breach of the contract, by serving a rescission notice purporting to rely on breach of this General Condition and by subsequently purporting to rescind under s. 32(5), neither of which was consistent with rescission ab initio on the ground of fraudulent misrepresentation.

10. The effect of back-up notices to complete or of rescission.

Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd [2014] VSC 57. Following the failure of the nominee purchaser to settle in January 2011 the

vendor served a notice of default and rescission, which subsequently expired. In late March the vendor served another notice of default and rescission. Garde J held that –

(a) the contract was rescinded by the first rescission notice. As stated in the subsequent case of ***A & S Boesley Pty Ltd v Stoney & Anor*** [2014] VSC 323 -

> "When the default set out in the default notice was not remedied in the time stipulated, the contract was terminated. It is difficult to conceive how any later representation or conduct could retrospectively 'waive' the stipulation in the contract that time was of the essence so as to prevent its termination or to reinstate it after it had been terminated."

(b) it was, however, permissible for a party, claiming to have terminated a contract, to give a notice to complete which was expressed to be without prejudice to its contention that the contract was terminated. This took effect as an offer to revive the agreement, capable of being accepted by performance in accordance with the terms of the notice to complete, and it was also then possible for the other party to do something consequent upon the service of the notice which could create an estoppel. See also ***Naval and Military Club v Southraw Pty Ltd & Anor*** [2008] VSC 593.

Comment: If you are confident in your original notice of rescission, or despite not being particularly confident you do not want to give the other party a second bite of the cherry, then do not subsequently serve a second notice to complete or of rescission. But if you are confident that the other side will still not comply with the contract, and you are in doubt about your first attempted rescission, it may be worth serving subsequent notices.

11. Caveats by purchasers.

Power to lodge a caveat over land is given by s. 89(1) of the Transfer of Land Act which enables any person claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law or otherwise to lodge a caveat. A purchaser under a contract of sale has an equitable interest and so should caveat, because a caveat or failure to caveat may also affect priorities between unregistered interests: eg ***Mimi v Millennium Developments Pty Ltd*** [2003] VSC 260 at [39]. Recent cases on caveats as they affect contracts of sale may be summarised as follows –

(a) The interest of a purchaser under an agreement to purchase land is caveatable, eg ***Mimi v Millennium Developments Pty Ltd*** [2003] VSC 260; ***Kearsley v Robson*** [2011] VSC 50; ***Qin v Smith*** [2013] VSC 158.

(b) But if no contract ever existed (eg ***Love v Kempton*** [2010] VSC 254) or the contract has been rescinded such caveat will be removed: ***A & S Boesley Pty Ltd v Stoney & Anor*** [2014] VSC 323.

(c) Where a contract is rescinded the former purchaser may caveat in respect of a claimed equitable lien over the land to secure return of the deposit, which caveat will be removed if the contract is validly rescinded: ***Graham v Gameday Enterprises Pty Ltd*** [2008] VSC 140, ***Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd*** [2011] VSC 222, ***Damco Nominees Pty Ltd v Moxham*** [2012] VSC 79.

(d) A caveat may support a particular contractual term, even in favour of a vendor. In ***West Coast Developments Pty Ltd v Lehmann*** [2013] VSC 617 contracts of sale included provisions that certain drainage works were to be constructed on certain land by the purchaser and included a provision that

> "to secure the Purchaser's performance of its obligations under this contract ... the purchaser charges its interest in the Property in favour of the Vendor. The Vendor will release or subordinate the charge as reasonably requested by the Purchaser to allow the Purchaser to progress the development of the Property in accordance with the Development Plan."

A dispute arose about the works and the vendor lodged a caveat claiming "an equitable estate or interest as chargee." The purchaser contended that the charge did not support a debt or other pecuniary obligation, and so did not give rise to an equitable interest. Robson J held that the vendor had prima facie established that a non-pecuniary interest might, in certain circumstances, give rise to a charge capable of supporting a caveat but that the vendors were in this case contractually obliged to release or subordinate the charge, as reasonably requested by the purchaser, to allow the purchaser to develop the property. Accordingly, even if the charge was capable of supporting a caveat as a matter of law, the vendors had not made out a prima facie case that the charge was supportable under the relevant agreements if a reasonable request for removal of the charge was

made. A caveat based on the same contractual provision was not removed on the balance of convenience in ***West Coast Developments Pty Ltd v Lehmann*** [2014] VSC 293.

(e) It is more difficult to amend the interest claimed in a caveat than to amend the grounds: ***Percy & Michele Pty Ltd v Gangemi*** [2010] VSC 530; ***S & D International Pty Ltd (in liq) v Malhotra*** [2006] VSC 280 at [16].

(f) Section 90(3) enables a person adversely affected by a caveat to bring proceedings for the removal of the caveat. To maintain the caveat the caveator must establish that there is a serious question to be tried that the caveator has the estate or interest claimed, and having done so, to establish that the balance of convenience favours the maintenance of the caveat until trial: ***West Coast Developments Pty Ltd v Lehmann*** [2014] VSC 293. The court takes whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong", in the sense of maintaining the caveat in favour of a party who fails to establish his right at trial, or in removing the caveat of a party who succeeds at trial (***Piroshenko v Grojsman*** [2010] VSC 240; ***Percy & Michele Pty Ltd v Gangemi*** [2010] VSC 530). The court attempts to act in a "commercially realistic manner" (***Shaw v Yarranova Pty Ltd*** [2005] VSC 94 at [67]).

The court will take into account whether, if the caveat is removed and the caveator is left with a remedy in damages, these will be an adequate remedy: ***Shaw v Yarranova Pty Ltd*** at [69]. Normally damages would not be an adequate remedy for a purchaser of land – thus in ***Qin v Smith*** [2013] VSC 158 the balance of convenience favoured giving the caveator an opportunity to complete the purchase. But if the balance of convenience dictates that the property should be sold forthwith, the court will take into account whether the caveator's claim is sufficiently strong to justify protection of its rights. Such protection may require either or both of the normal undertaking as to damages required on an application for interlocutory injunction and an undertaking by the plaintiff that the settlement proceeds be held in trust and only be distributed according to the order of the court: ***Sarandal Pty Ltd v Maneplan Pty Ltd*** [2007] VSC 568 [138]; ***Marchesi v Vasiliou*** [2009] VSC 213 at [103].

(e) An example where a purchaser under a contract of sale may not succeed in maintaining a caveat is where the registered proprietor is already contractually bound to transfer the land to a bona fide purchaser for value (***Rojtarowski v Rojtarowski*** [2009] VSC 15 at [23]; ***Perpetual Trustee Company Ltd v Lindlirim Pty Ltd*** [2009] VSC 182 at [23].

(g) Costs in s. 90(3) proceedings normally follow the event. However, the Supreme Court is showing an increased tendency to visit seriously unsuccessful caveators with orders for costs, if not indemnity costs (eg the decision at first instance in ***Maher v Commonwealth Bank of Australia*** [2008] VSCA 122; ***Marchesi v Vasiliou*** [2009] VSC 213; ***Luther v Milner*** [2009] VSC 595; ***Love v Kempton*** [2010] VSC 254; ***Rubytime Nominees Pty Ltd v Bottiglieri*** [2011] VSC 678); ***Sovereign MF Ltd (In liq) v EOS Janus Holdings Pty Ltd*** [2013] VSC 347; ***Apartment Developments Pty Ltd v Johnson*** [2013] VSC 136.

12. Specific performance.

Dixon J stated in *Dougan v Ley* (1946) 71 CLR 142 that a contract for the sale of land has always been considered the proper subject of specific performance. ***Anthony v Vaclav*** [2009] VSC 357, where a purchaser obtained specific performance, illustrates that the court can impose conditions on the grant of relief: paras. 146 – 149.

13. Damages.

(a) Basic principles (largely taken from ***Victorian Economic Development Corporation v Clovervale Pty Ltd and Others*** [1992] 1 VR 596) –

(i) The fundamental object of an assessment of damages at common law for breach of contract is to place the injured party, so far as money can do it, in the same situation with respect to damages as if the contract had been performed;

(ii) Where the vendor has terminated the contract the assessment will ordinarily involve (but will not be confined to) an ascertainment of the difference between the contract price and the value of the subject land at the date of the determination of the contract. The price of any resale may be relevant.

(iii) The damages may also include expenses or other loss that had necessarily flowed from the breach; and the rule in *Hadley v*

Baxendale will apply. (General Condition 25(a) provides that a party in breach must pay compensation for any reasonably foreseeable loss to the other party resulting from the breach). The expenses of an appropriate resale will ordinarily be recoverable; and any necessary outgoings incurred or losses suffered in the period between breach and resale may also be recoverable. As to interest see General Conditions 25(b) and 26.

(iv) A helpful collection of items recoverable by a vendor are found in ***Pettiona v Whitbourne*** [2013] VSC 205. A recent case on purchaser's damages is ***Patmore & Anor v Hamilton*** [2014] VSC 275 – recovery of deposit, costs of the conveyancing transaction, with interest.

(b) In (a)(ii) it is stated that the assessment will ordinarily involve an ascertainment of the difference between the contract price and the value of the subject land at the date of the determination of the contract. The vendor attempted an assessment at the date of trial in ***Vouzas v Bleake House Pty Ltd*** [2013] VSC 534. When the vendor rescinded the contract on 1 June 2009 the land was worth $10 m. In mid June 2009 the vendor attempted to resell the land, without any success. The value of the land at trial in January 2013 had fallen to $8 m. Macaulay J. held damages to be assessable at the date of breach, in part because the vendor had not demonstrated that it took all reasonable steps to mitigate its loss and because a loss measured 3½ years after the breach appeared too remote. He rejected the argument that, once it became evident it could not sell the property to the purchaser, it became "impracticable" for the vendor to sell the property thereafter. That

(c) If the deposit forfeited by a vendor exceeds 10% an argument will arise whether the excess amounts to a penalty and should be refunded. This point was generally discussed in ***Martorella & Anor v Innovision Developments Pty Ltd & Anor*** [2011] VSC 282 at 31 – 42 without any order being made. However there are varying Victorian authorities. In ***Smyth v Jessep*** [1956] VLR 230 relief against forfeiture was granted of a deposit which on one interpretation of the agreement amounted to 40% of the purchase money. In ***Re Hoobin*** [1957] VR 341 where the vendor was permitted to retain a deposit totaling 25% of the purchase price since the balance of the price was payable 8 years after possession and the contract

permitted resale by the purchaser. In ***Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd*** [2011] VSC 222, after the contract had been renegotiated because of the purchaser's inability to settle, the amended deposit amounted to about 20% - Dixon J stated that a re-negotiating vendor is entitled to increase the deposit as assurance of the purchaser's willingness to commit a second time to the transaction. And in ***Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd & Anor*** [2011] VSC 661, not being a contract of sale but for works, Kaye J allowed forfeiture of a deposit of over 35%.

14. **Vendor's duty on resale.**

In ***Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd*** [2014] VSC 57 the vendor was held to have justifiably rescinded a contract of sale for $6.5 m. The subsequent relevant history was:

April – May 2011	Vendor appoints an agent to resell the property. No offers.
29 June	Property passed in at auction after further marketing campaign. Subsequently the property is sold by the vendor for $2.1 m.
31 October 2011	Property on-sold by the purchaser from the vendor for $6 m. including an allowance for civil works of $500,000.

General condition 28.4 provided for the resale of the property "in any manner" This expression authorised the vendor to resell by public auction, tender, expressions of interest or private sale. Further Garde J held –

(a) There was also an implied term that the vendor would act reasonably in the exercise of its power of resale.

(b) The right of resale, and the right to recover liquidated damages, were intended to benefit the vendor as against the purchaser in breach, and did not subordinate the vendor's interests to those of the purchaser. Where the interests of a vendor and the purchaser in breach were in conflict, for example as to the urgency or method of the resale, the vendor was entitled to prefer his own interests, provided that in so doing the vendor acted in a reasonable manner.

(c) The purchasers must show that the vendor either failed to mitigate or did not act reasonably in the resale process and that, as a result, a higher price for the resale of the property was not achieved. In this case the vendor acted in good

faith and did everything it could to achieve the maximum price, whilst taking into account its need to meet its obligations to the Bank.

15. Calculation of vendor's loss if property not resold.

This will be determined by valuation evidence: ***Pettiona v Whitbourne*** [2013] VSC 205. Two points of interest in that case were:

(a) The property was subject to a lease with 11 months to run. One valuer valued the property on the basis that it was subject to this lease but the other valued it assuming a sale with vacant possession because the purchaser had informed him that his offer for the property, which had been accepted, was on the basis of vacant possession. Davies J rejected this: the basis on which the offer had been put did not negate the fact that it was a term of the contract that the property was sold subject to that lease.

(b) The vendor was entitled to interest on the unpaid balance of purchase price from the agreed date of settlement to the date of expiry of the rescission notice, ie 17 days. The purchaser argued, however, that the rent that the vendor received for the period of approximately 6 months before the rescission must be set off against the interest entitlement. Davies J rejected this, distinguishing ***Mallet v Jones*** [1959] VR 122, on the ground that here the vendor had the contractual right to interest on the money owing under contract during the period of default "without affecting any other [of her] rights" (General Condition 26).

16. Avoidance by purchaser for breach of terms contract conditions.

In ***Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd*** [2014] VSC 57 the relevant chronology was -

18 December 2008	Contract of sale for $6.5 million. The purchaser paid a deposit and the balance was due in 12 months.
23 December 2009	Contract varied to provide for the deposit to be $1.325 million with the balance of deposit of $1 million to be paid no later than 31 January 2010, a further interim payment of $3.675 million payable 150 days after rezoning of the property or settlement (whichever was the earlier), and the remaining $1.5 million at settlement on 18 December 2010 ('the varied sale contract'). Two new special conditions were agreed.

Within approximately an hour of not attending a settlement appointment the nominee purchaser purportedly avoided the contract on the basis that it was a terms contract as defined in s. 29A(1) of the Sale of Land Act and so was required to comply with s. 29O(1) (as to discharge of a mortgage). Section 29A(1) provided that a contract was a terms contract if the purchaser was obliged to make two or more payments (other than a deposit or final payment) to the vendor after the execution of the contract and before the purchaser was entitled to a conveyance or transfer of the land. As to the argument the second payment (ie the further payment of $1 million due by 31 January 2010 and described in the varied sale contract as part of the deposit) and the third payment (ie the interim payment of $3.675 million) constituted two payments (other than a deposit or final payment) Garde J held the second payment was intended by the parties to be part of the deposit. Accordingly this was not a terms contract. It was also a pre-condition of avoidance under s. 29O that the purchaser was not in default under the contract at the time it purported to avoid it.

17. Rescission by purchaser related to a sale off the plan.

The Sale of Land Act provides –

s. 9AC -

(1) If after a prescribed contract has been entered into and before the registration of the relevant plan of subdivision an amendment to the plan is required by the Registrar or requested by the vendor, ...
(2) The purchaser may rescind a prescribed contract of sale within 14 days after being advised by the vendor under subsection (1) of an amendment to the plan of subdivision which will materially affect the lot to which the contract relates.

s. 9AE(2) -

"If the plan of subdivision is not registered within 18 months after the date of the prescribed contract of sale of a lot on that plan of subdivision, or, if the contract specifies another period, before the end of that specified period, the purchaser may, at any time after the expiration of that period but before the plan is so registered, rescind the contract."

There are two cases on each section. As to s. 9AC(2) -

In ***Besser v Alma Homes Pty Ltd*** [2012] VSC 460 the contract was for Lot 4 on a proposed 4 lot plan of subdivision. The plan stated that each lot was to have and equal lot entitlement and liability. The registered plan altered this entitlement and

liability to one out of 202. The purchaser was entitled to rescind under s. 9AC(2). Pagone J held that whether an amendment would materially affect the lot was determined by objective facts and circumstances, notwithstanding that the vendor may have intended to benefit the purchaser by the amendment, and rejected the argument that this was not an amendment to the plan because the change did not affect boundaries or physical features.

In ***Lockwood v PSP Investments Pty Ltd*** [2013] VSC 10 eight contracts were entered into each for purchase of four apartments in a new multi-storey development and four car parks on the ground floor. The Municipality required the deletion of the car park lots, which would merge into common property. Judd J held the purchaser entitled to rescind the apartment contracts under s. 9AC(2). He reasoned –

(a) For an amendment to have material effect it need not be deleterious or adversely affect the lot or the rights of the purchaser under the contract. Here the purchaser had in substance purchased four packages, each consisting of an apartment and car park – there was an interdependency between each contract for the sale of an apartment and each contract for sale of a carpark. The inquiry went beyond an analysis of the change, if any, to lot entitlements and liabilities.

(b) Not only had the purchaser lost the benefit of the car park lot contracts, the enlarged common property would have various effects.

(c) His Honour would in the alternative if necessary have ordered the return of the deposit under s. 49 of the Property Law Act .

As to s. 9AE(2) -

In ***Solid Investments Australia Pty Ltd v Clifford & Anor*** [2010] VSCA 59 the contracts were expressed to be conditional upon registration of the plan of subdivision and in substance, within the meaning of s. 9AE(2), specified 30 months after the date of sale (instead of 18 months). The Court of Appeal held that the a vendor could not also include a Special Condition giving it the right under certain circumstances to further extend the plan registration date “by such a period as the Vendor may reasonably determine from time to time”.

This reasoning was applied in ***Harofam Pty Ltd v Scherman*** [2013] VSCA 104 to render nugatory a Special Condition which included the words -

"If the Plan of Subdivision is not registered within twenty-four (24) months of the Day of Sale or such further time, but such further time to not exceed 6 months, as the Vendor may by notice in writing to the Purchaser require in the event that delays occur as a result of any act, matter or thing beyond the reasonable control of the Vendor which directly or indirectly causes the registration of the Plan to be delayed, either party may, at any time after the expiration of this period or such extended period, but before the Plan of Subdivision is registered, rescind the Contract ...

The Court of Appeal held that s. 9AE(2) required a specific period of time in which the plan of subdivision must be registered, at the time when the contract is made, and "specifies another period" did not encompass the identification of a period by reference to an ascertainable event, even when the occurrence of that event can be determined objectively.

18. Relief for purchasers arising from pre-contractual statements – fraudulent misrepresentation.

At common law rescission and damages were available for fraudulent misrepresentation. A recent illustration of the law is ***ZX Group Pty Ltd v LPD Corporation Pty Ltd*** [2013] VSC 542. Section 13 of the Sale of Land Act provides that if it is proved that any representation made on a sale of land was false, and induced another person to enter a contract of sale, the representor shall be deemed to have made it with knowledge of its falsity unless proving belief on reasonable grounds that the representation was true or that he or she had no reason to suspect its falsity, and otherwise he had acted innocently. General Condition 2.3(d), which contained the vendor's warranty that it had not previously sold the land, also made pre-contractually, was held to breach s. 13. The purchaser could have, but had not, rescinded the contract on the basis of this misrepresentation – it had however elected otherwise (see above under Election).

19. Relief for purchasers arising from pre-contractual statements – misleading or deceptive conduct.

The law of fraudulent misrepresentation has been overtaken by the law of misleading or deceptive conduct, formerly found in s. 52 of the Trade Practices Act and s. 9 of the Fair Trading Act. However, by the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 the relevant TPA

provisions were replaced by provisions in the Australian Consumer Law, set out in Schedule 2 of that Act. The central provision is s. 18(1): "A person must not in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." As with the TPA, very wide remedies are given (eg ss. 236, 243, 244). The Australian Consumer Law and Fair Trading Act 2012 (Vic) s. 233 repealed the FTA and provided that the Australian Consumer Law text, as in force from time to time, applied in Victoria and as so applying may be referred to as the Australian Consumer Law (Victoria), and as so applying was a part of the 2012 Act (s. 8). These statutory reworkings have not altered the law stated below.

The purchaser eventually won in ***ZX Group Pty Ltd v LPD Corporation Pty Ltd*** on this ground. Williams J held that by the misrepresentation that there was no other purchaser for the land the vendor engaged in misleading or deceptive conduct under s. 52 and also made a false or misleading representation contrary to s. 53A concerning the nature of its interest in the land, being to the extent that the previous contract gave the previous purchaser an undisclosed equitable interest or equity binding the vendor. The purchaser was induced to enter the contract as a result of this conduct and misrepresentation. Under s. 82 of the TPA it could recover for damages for loss caused by the misrepresentation. It also obtained a declaration under s. 87(2)(a) that the contract is and has been at all relevant times void ab initio, and was rescinded ab initio, and an order for refund of the deposit under s 87(2)(b). Even if the purchaser had affirmed the contract this would not have precluded the Court from granting rescission under s. 87.

Cases on misleading or deceptive conduct break into the categories of misleading or deceptive conduct by statement and by silence.

20. **Misleading or deceptive conduct by statement.**

ZX Group is one example. Another example is ***Lord Buddha Pty Ltd v Harpur*** [2013] VSCA 101 which concerned pre-contractual representations by a vendor including that 5 named well known tenants wanted to lease the land. The Court of Appeal dismissed an appeal, holding that it was open to the judge to find that the representations were made and of reliance on them. As to whether there was unsatisfactory evidence of reliance, the court stated that if a material representation is made which is calculated (ie objectively likely) to induce the representee to enter into a contract, and is of a kind likely to provide an inducement, and that person in fact enters into the contract, a rebuttable inference

may be drawn that the representation operated as an (and it need not be the only) inducement for the person to do so.

In ***Wedgewood Road Hallam No 1 v Diamond*** [2013] VSC 447 a statement on behalf of a vendor as to what the final level of land would be was held not to be misleading or deceptive. The representation implicitly represented that the vendor honestly intended to perform the promise and had reasonable grounds for thinking that the promise could and would be performed (and s. 51A(2) of the Trade Practices Act provided that a representation is deemed to be have been made without reasonable grounds unless evidence is produced to the contrary). The vendor satisfied the honest and reasonable criteria.

21. Misleading or deceptive conduct by silence.

The foundational case on silence is ***Demagogue Pty Ltd v Ramensky*** (1992) 39 FCR 31, which upheld a decision of a trial judge that a vendor of land had engaged in misleading or deceptive conduct by creating an erroneous impression in the purchasers that there was nothing unusual concerning access to the land and, in particular, had been silent that access depended on grant of a licence by a statutory authority. Black CJ stated at 32 that silence was to be assessed as a circumstance like any other, the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. Gummow J stated at 41, however -

"unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist".

This use of the concept of “reasonable expectation” although not found in the statute is a tool frequently subsequently applied.

Thus in ***Charles Lloyd Property Group Pty Ltd v Buchanan*** [2013] VSC 148 a vendor of land did not disclose to the purchaser that someone had committed suicide on the land two years earlier. The purchaser failed for various reasons. Mukhtar AsJ stated –

“39 … This is a case of mere non disclosure. It is not a case of misleading impression or half truth. It is arguable that it matters not that the vendor’s son, Mr Buchanan did not intend to stay silent about the suicide or did not intend to deceive anyone. The vendor was under a statutory duty to act in a way which does not mislead or deceive. The question is whether the plaintiff was led into error. As a working test, one may ask were the circumstances such as to give a reasonable expectation that if some relevant fact existed it would be disclosed.”

The purchaser failed because the suicide was not material and also it did not show that, had there been disclosure of the fact of the suicide, it would have acted differently.

Misleading or deceptive conduct by silence was also argued unsuccessfully in ***Vouzas v Bleake House Pty Ltd*** [2013] VSC 534. It will be recalled that the assignee of the lease was Collingwood Football Club. It announced that it had signed Heads of Agreement to sell the hotel business with 6 – 12 months settlement, subject to conditions. The purchaser was not told of the Heads or of the "consent" by the vendor to the proposed assignee from Collingwood – was this, in the context of the various representations, apt to lead a reasonable person in the position of the purchaser into error? Macaulay J. held that the alleged conduct was not apt to induce a belief about the likelihood that Collingwood would remain the tenant, for any particular time into the future, that was materially different to the belief that person would have held absent such conduct – a reasonable buyer in the purchaser's position would appreciate that there could be no certainty Collingwood would not subsequently assign the lease. However, if there had been misleading or deceptive conduct there was no loss because the probable reason for the purchaser seeking to avoid settling the contract was not related to the lease but to inability to obtain finance.

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