

Short Minutes Transcript: Conveyancing Deposits – 5% or 10%?

Solicitors will be aware that it is now extremely common for property sales to be negotiated on the basis of a deposit of 5% rather than the traditional 10%.

It is the practice of many solicitors acting on behalf of vendors to include a special condition in the contract for sale when a 5% deposit has been negotiated to the effect that the deposit is 10% but is to be paid by an instalment of 5% on exchange and the balance on completion.

Lawcover recommends that all property solicitors familiarise themselves with the 2008 judgment of Justice Brereton in the matter of *Boyarsky and Taylor*. In that matter the purchaser had paid a 5% deposit on exchange. The contract contained the following special condition:

“The deposit is 10% of the price, but payable by instalments, with half the deposit payable on exchange and the balance of the deposit payable on the completion date (as defined in the contract).”

When the purchaser defaulted on the completion of the contract, the vendor sought recovery of the other 5% of the deposit.

The court refused to order that the purchaser pay the second instalment on the basis that the second 5% was void as a penalty.

Following this decision it is clear that special conditions to the effect that the balance of deposit is payable in any circumstance other than on completion will not protect a vendor in the event the purchaser fails to complete the contract.

Solicitors should:

- Advise vendors in writing that if they agree to a deposit of 5% this will be the maximum amount that the purchaser will forfeit on default.

Vendors, of course, may be entitled to further damages over and above the deposit if the property is later sold at a further loss.

A link to the case can be found below:

[Boyarsky v Taylor \[2008\] NSWSC 1415](#)

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