

## Rebates in Vendor-Purchaser Transactions

There are a variety of circumstances in which, and mechanisms by which, a vendor can provide a rebate to a purchaser. Some of these arrangements are entirely unobjectionable. Others raise ethical dilemmas for the parties and their advisors.

It is not unusual for developers (for example, Landcom) to offer a rebate payable in return for the purchaser undertaking works designed to improve the quality and amenity of the subdivision. The obligations imposed on the purchaser often involve landscaping, compliance with design guidelines or building on the property within a nominated period after completion. Such provisions typically involve a rebate which is widely advertised, available to all purchasers in the subdivision, detailed prominently in the contract for sale (both on the front page and by special condition) and for an amount which is commensurate with the value of the work undertaken. Such rebates are unlikely to raise ethical issues

By contrast, rebates which are not widely publicised, are not prominently documented in the contract for sale, are for amounts which are a significant proportion of the purchase price, are payable in a way which does not accord with common conveyancing practice (for example, by relieving the purchaser of the obligation to pay a deposit) and for which the purchaser provides no corresponding benefit to the vendor, are open to challenge. Such rebates, and the role of solicitors in the transaction which includes such rebates, have been considered (and criticised) in a number of Court cases. For example, in *Miro v Fu Pty Ltd* (2003) 11 BPR 21,231; [2003] NSWSC 1009, Windeyer J observed (at 21,233) of the rebate arrangements in the contracts under consideration:

[15] I have said before and say again that this type of clause is quite improper. It can be inserted for no purpose other than to mislead persons such as lending authorities and purchasers of other units in that development. In my view it is likely that solicitors who purposely prepare contracts with contradictory clauses such as this may be guilty of professional misconduct. It is more serious when the solicitor is a party to the contract as vendor. Unreal stated consideration for reduction, although that is not the case here, does not improve the position. Instructions of clients cannot excuse such conduct.

[16] The contract price for lot 4 is \$349,000. The schedule price is \$450,000. This is said to be explained by making an allowance for an amount due to the purchaser who is or was the builder for the development. If that is so, the contract gives a false figure and is a fraud on the Chief Commissioner for Stamp Duties. The contract price for lot 6 stated on the front page of the contract is \$340,000 subject to some adjustments, which is proper to say are at least identified on that front page. Nevertheless while the contract on the front page provides for a deposit of \$33,170 the special conditions appear to provide that the deposit was not to be paid. The contract price when one takes into account the extraordinary provisions of special conditions 32 and 33 ends up as being \$276,830. People who enter into these contracts are asking for the problems that are sure to befall them when disputes arise.

Conduct that results in the publication or other promotion of prices which are misleading has implications not only for the legal profession and the revenue authorities but also for financiers, estate agents, valuers and the wider public interest.

Some questions which practitioners might ask when considering whether or not to act on instructions to implement a rebate arrangement:

- What is the purpose of providing for a rebate?
- Can the outcome sought by the client be better achieved by other means – for instance, a reduction of the purchase price?
- What is the amount of the rebate (both in absolute terms and as a proportion of the purchase price)?
- What are the conditions precedent which need to be satisfied for eligibility for the rebate?
- Is the rebate to be offered to all prospective purchasers, or is it only relevant to some of them?
- How is the rebate to be documented in the contract and associated documents – by a reference on the front page of the contract; by a special condition; by specific reference in correspondence with a mortgagee?
- When is the rebate to be provided – at settlement, at satisfaction of conditions precedent or at some other time?
- Do the proposed arrangements have any implications to the parties regarding stamp duty, GST and Capital Gains Tax?
- In what way and to what extent are those who are not parties to the contract for sale (for example mortgagees, estate agents, other prospective purchasers) likely to become aware of the arrangement?

Practitioners should be concerned to ensure that the instructions do not have the effect of perpetuating fraud or producing a rebate which is otherwise misleading.

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