

# LAW5006 PRINCIPLES OF PROPERTY LAW

## EXAM NOTES

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## STATUTORY REGULATION OF LAND SALES

### S32: VENDOR'S STATEMENT

Section 32	Topic
A	Financial matters
B	Insurance details
C	Land use
D	Notices affecting land
E	Building permits
F	Owners corporation information
G	Growth areas infrastructure contribution
H	Non-connected services
I	Evidence of title
J	Using certificates or documents to satisfy disclosure
K	Rescission or false or missing information
L	Offence for sale or incomplete information
M	Rescission for notice of intention to acquire
N	Anti-avoidance
O	No need for second statement
P	Forest carbon rights

#### Issue: Can [party] rescind under s32 SOL Act?

Under a contract for the sale of land (SOL), [vendor] (the vendor) must give [purchaser] (purchaser) a signed vendor's statement that contains the matters and documents specified in Division 2 before [purchaser] signs the contract (s32 SLA).

On the facts, [seller] did not give [purchaser] a vendor's statement. [\[Go to s32K\]](#)

#### s32K: Is the right to rescind available?

Per s32K, unless an exception applies (considered below), [the purchaser] may rescind the contract for the SOL anytime before she accepts title and becomes entitled to possession or to the receipt of rents and profits as [\[choose 1\]](#):

- [the vendor] supplied false information to [purchaser] in a s32 statement or its attachments
- [the vendor] failed to supply all information as required by s32
- [the vendor] failed to give the [purchaser] a s32 statement before she signed the contract.

As [purchaser] has become a registered proprietor [i.e. [accepted title](#)] of the premises, they can no longer rescind the contract.

#### Does an exception apply?

The court may refuse rescission if the vendor acted honestly and reasonably, and the purchaser is substantially in as good a position as if the statement had been provided.

[Not relevant if purchaser has accepted title.](#)

#### Has the vendor acted honestly and reasonably?

If the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention, the purchaser may not rescind a contract for the SOL (s32K(4)(a) SLA).

[Apply: Did vendor know disclosure requirements and try to avoid them?](#)

Therefore, this exception [does/doesn't](#) apply and [seller] [should/shouldn't](#) be excused for the contravention of not providing a s32 statement.

## Is purchaser substantially in as good a position as if all the relevant provisions of Division 2 had been complied with?

If the purchaser is substantially in as good a position as if all the relevant provisions of Division 2 had been complied with, the purchaser may not rescind a contract for the SOL (s32K(4)(b) SLA).

Apply: Is purchaser's position changed due to vendor statement? Is there information there available such that she wouldn't proceed?

## Conclude

### DUE DILIGENCE CHECKLIST

A Due Diligence Checklist must also be made available by the Vendor as soon as the property is offered for sale (S33-33C SLA). The checklist assists purchasers in identifying information they may wish to obtain in respect of the land for sale (s33A SLA).

A copy must be available (1) at any open for inspection and (2) on an appropriate website (s33B(6) SLA).

### COOLING OFF PERIOD

A purchaser who has signed a contract of sale may terminate that contract by giving notice to the vendor, as long as it is within three clear business days of signing it (s31(3) SLA).

If the purchaser decides to terminate the contract, they will still have to pay \$100 or 0.2% of the purchase price (whichever is greater) to the vendor (s31(4) SLA).

Cooling off provisions do not apply to auctions, or 3 days before/after an auction (i.e. they really only apply for private sales of land).

### INSURANCE

Before they become entitled to possession, purchaser can rescind contract where house is destroyed or damaged so as to be unfit for occupation by notice in writing given to the vendor/ conveyancer within fourteen days after the purchaser becomes aware of the destruction (s34(1) SLA). Upon rescission, any moneys paid by purchaser shall be refunded, title shall be returned to vendor (s34(2) SLA).

During settlement (prior to purchaser becoming entitled to possession), the vendor holds insurance to ensure for benefit of purchaser (s35 SLA). The purchaser is insured in the same manner as the vendor would have been.

Where land is destroyed or damaged, if the vendor can remedy the damage before the purchaser becomes entitled to possession or to the receipt of rents and profits, the purchaser cannot rely on s34 or s35 (s36 SLA).

## RESTRICTIVE COVENANTS (RC)

### Examples of restrictive covenants:

- Erect only one dwelling house
- Build a dwelling of a certain height only
- Use a dwelling as a private residence only
- Not excavate earth, clay or stone from the land
- Not build a dwelling other than from agreed materials
- Not to build a dwelling other than with determined designs or models

Covenantee = DT

Covenantor = ST

### Issue

Identify DT/covenantee and ST/covenantor.

The issue is whether the [restrictive covenant] to which parties agreed to in [date] amounts to a restrictive covenant such that [restriction on what party is seeking to do].

### Step 1: Are the RC characteristics present?

#### Negative covenant

Covenants must be negative in nature to be enforceable in equity (Haywood). The courts will examine the substance, rather the form of the agreement.

As required:

- The **requirement to spend money** will usually mean a covenant is positive.
- A **positive obligation** may be binding if the covenant as a whole may be complied with by inaction.

Apply: the covenant is negative as it can be complied with by the inaction of [inaction].

Negative covenant	Positive covenant
<ul style="list-style-type: none"> <li>- Submit plans before building &gt; covenant not to build without first submitting plans</li> <li>- Use a dwelling as a private residence &gt; covenant to note use the premises for any purposes other than a dwelling</li> </ul>	<ul style="list-style-type: none"> <li>- Covenant to repair (Haywood).</li> </ul>

#### The RC benefits the DT

The RC must identify the land intended to be benefitted (Pollard).

Apply, analogise Pollard:

- The [clause/RC] does/doesn't identify the land to be benefitted as [apply].
- This is a general identification, as [there is no address/could be lot on another property]

#### The covenant must touch and concern (T&C) and run with the land

Per Pollard, the covenant cannot be for the personal benefit of the original covenantee. It must benefit the land.

Apply: is there an intention that RC is for a personal benefit? Analogise/distinguish Pollard

Choose 1:

- **No personal benefit:** In the absence of a contrary intention, PLA ss78-79 deem the covenant to run with the land, so the benefit and burden pass on to the DT and ST successors in title.
- **Personal benefit:** As there is likely an intention for personal benefit, ss78-79 PLA, which deem the covenant to run with the land so the benefit and burden pass on to the DT and ST successors in title, do not apply.

## There must be an intention to bind the land

A successor to the covenantee [i.e. DT owner] must prove the original parties intended the covenant's burden to run on later disposition of the land.

**Apply:** The parties agreed that [include language from RC, e.g. their successors] would be bound by the [RC]. This signifies intention to bind future successors-in-title.

## The purchaser must take notice of it

The Registrar may record RCs on folio (TLA s88), although this does not give the RC any greater operation that it already has so does not make it indefeasible or valid (sub-s (3)).

**Apply:**

- Was the RC recorded?
- This means the purchaser did/didn't take notice of the RC.
- Note that recording the RC does not make it valid, but the recording does meet the notice requirement.

## Conclusion

- **No:** The RC characteristics are likely not present as [missing characteristic]. While the RC was recorded, this does not make it valid.
- **Yes:** The RC characteristics are likely present, so it is possible the RC was created.

Case	Facts	RC benefits DT	T&C / run with the land
Pollard	Alleged single dwelling and building materials (brick or stone) covenant. This covenant was only imposed on one lot in the subdivision plan.	The covenant did not identify the land intended to be benefited, not even in general terms.	No other lot in the sub-division had any covenant. Court suspected that original owner did not want stable built on land. This was for a personal benefit of the covenantee so invalid.

## Step 2: Can the RC be varied or removed?

Vrakas	
Facts	Application under s84(1) PLA to modify/discharge single dwelling RCs on plaintiff's land. V is real estate agent and bought land not knowing of RC. Nearly all lots in that area had same single dwelling RCs. V's application dismissed.
Character	<b>Neighbourhood had not changed.</b> Defendants argued for special character of neighbourhood, particularly absence of townhouses and units, spacious homes, quite tree-lined streets making area enjoyable. <b>Purpose of RC:</b> to establish an estate that is dominated by good-quality, detached single dwellings and low-density housing with space for gardens. <b>Not obsolete:</b> RC provides guarantee of single dwelling house, residential use. Ongoing benefit for defendants.
Impede reasonable user	<b>Reasonable use of land:</b> There was no evidence that, by reason of changed family circumstances, the property was no longer capable of being used as a family home. Nor was there any evidence about particular proposed alternative uses that were impeded by RC. It is not enough to assert the RC provides less options.
Not substantially injure	Impairment of the neighbourhood may suffice for real and not fanciful injury. <b>Benefit:</b> low density housing and spacious and aesthetic environment. <b>Benefits that would remain:</b> character of neighbourhood would be altered in real and not fanciful manner as defendants regularly walk/drive past V's land. <b>Precedent:</b> removal of RC would encourage other developers to discharge/modify RCs.

Assuming the RC is valid, [ST owner] is advised to apply to the Supreme Court for an order to discharge or modify the RC (s84(1) PLA). One of the below must be satisfied.

### Character (s84(1)(a))

The Court must be satisfied that, due to changes in the character of the property, neighbourhood or other circumstances, the RC is no longer enforceable or has become of no value so should be deemed obsolete (Vkrakas). Neighbourhood is determined at the date of the hearing, not the covenant (Vkrakas).

**As relevant:** A RC is not obsolete if it has any value for the persons entitled to the benefit, even if the benefit is diminished or the original purpose is wholly obsolete (Vkrakas).

**Analysise Vkrakas & apply:**

- Have there been changes to the property/neighbourhood?
- Is there any benefit for the DT owner?

### Impede reasonable use (s84(1)(a))

The Court must be satisfied the RC would impede [ST owner's] reasonable use of the land without securing practical benefits to [DT owner]. **Analysise Vkrakas.**

1. The RC hinders [ST owner's] reasonable use by ... (having regard to the surrounding property and purpose of the RC)
2. This impediment doesn't secure practical benefits to the DT owner as ...

**As relevant:**

- Sale value of the land and a precedential effect to the neighbourhood are practical benefits (Vkrakas).
- It is not enough to assert the RC provides less options for use of the land (Vkrakas).

### Will not substantially injure: s84(1)(c)

The order must not substantially injure the persons entitled to the benefit of the RC (Vkrakas). **Analysise Vkrakas.**

1. The benefits actually conferred by the RC are ...
2. The benefits that would remain after the order are ...
3. The injury is not substantial and not a real/fanciful detriment as ...

**As relevant:**

- **Specific plans:** A lack of specific plans makes it more difficult for an applicant to show no substantial injury (Vkrakas).
- **Precedent:** The precedent value of the discharge/modification of an RC may be relevant.