

Is there a contract?

To have any real hope of enforcing a contract it needs to be in writing. An Agreement for Sale and Purchase ("ASP") is one example of a "contract" (an Agreement to Lease is another). The law further specifically provides that contracts relating to land **must** be in writing to be enforceable (as always there are some narrow exceptions!).

There must be 3 essential elements in an ASP;-

- Parties
- Property
- Price

Parties

Just deciding who exactly are the "parties" to an ASP can surprisingly often be quite difficult! People sign ASPs as Vendors but are not the registered owners. People sign intending the Purchaser to be a company but the company is not formed yet! People sign intending a Trust to be the Purchaser but not all Trustees have signed (usually mandatory). People sign as Vendor but forget that a third trustee of their family Trust must also sign.

In the above situations the ASP is usually not properly signed and therefore cannot be enforced by either party.

Agents (not just real estate agents but anybody) or Attorneys can sign the ASP on behalf of a Vendor/Purchaser. In these situations there is always the issue of whether the "agent" has authority or whether the "attorney" has been properly appointed and the Power of Attorney not revoked. If the agent has no authority or there is no Power of Attorney then the person signing the Agreement is likely to be liable to complete the Agreement.

Often a Purchaser will include the expression "and/or nominee". Generally in these cases the person who signs the contract is still the one who is legally bound to complete the Agreement – not "the nominee". The nominee is not a party to the ASP and cannot sue the Vendor for any breaches of the ASP. The nominee can however take title to the property and for virtually all other intents and purposes becomes "the Purchaser". If the ASP is that of a "going concern" for GST purposes then the nominee provision can jeopardise the "going concern" status of the ASP (this will be another separate sermon!).

Property

The main issue here is to describe the property adequately. If the ASP says the property is "fee simple" (i.e. What most people consider to be "standard freehold") and it is in fact a "cross lease" then the Purchaser may cancel the ASP. If the ASP says the property is 800m² "approximately" and it turns out to be 750m² then the Purchaser may be able to cancel the ASP or claim compensation from the Vendor. The most common circumstances that the "property" is inadequately described in ASPs is where the house/unit is not built yet ("buying off the plans"). Here the Vendor gives as little details as possible as things change throughout a development.

Price

The only real issue here is certainty. Usually problems will only arise in circumstances where the price is not a set sum but is to be fixed by some "formula" e.g. \$100 per m² or "by registered valuation". The problems arise when the formula is not clear or doesn't set out all the mechanics of arriving at the price. If a dispute arises the Court will determine if there is sufficient certainty of price in the formula – otherwise the ASP is void.