Before you draft the payment term

Consent orders often require one party to pay the other a fixed sum by a fixed date, funded by refinancing the family home. Once sealed, that is a court order. If the finance doesn't come through, your client isn't in a failed negotiation. They are in breach.

This note sets out what is worth confirming before the term is drafted, and the three things that most often make a buyout undeliverable.

The problem is timing, not availability

Most buyouts can be funded. The difficulty is that the figure and the deadline are usually settled before anyone has tested whether they can be met, and by then the order is sealed. Three failure modes account for most of it.

1. **The lenders mortgage insurance cliff.** The property was comfortably geared on two incomes. Moving the loan from joint to sole names, plus the payout, pushes it past 80% of the lender's valuation. That triggers mortgage insurance on the whole loan, a one-off premium payable at settlement that nobody budgeted for. It is the most common reason an apparently simple buyout does not proceed.
2. **Serviceability on one income.** Lenders assess capacity at a buffer above the actual interest rate, and against a household expense benchmark that rises with the number of children. Two things bite that clients rarely anticipate: maintenance *paid* counts as a commitment, and an unused credit card is assessed as though it were drawn to its limit.
3. **The deadline.** A term requiring payment within a short fixed period leaves no room for a valuation that comes in low, a second lender, or a title issue. The clock runs from the order, not from the application.

A worked example

Illustrative only. Figures show the mechanism, not any particular matter or lender.

Property, on the lender's valuation	**$950,000**
Existing joint loan	**$520,000**
Equity	**$430,000**
Agreed split, in the other party's favour	**55%**
Payment term in the draft orders	**$236,500**
New loan required	**$756,500**
Loan against value	**79.6%**

WHAT THE NUMBERS DO

At a 55% split the loan is about $3,500 under the 80% line. Mortgage insurance is avoided and the transaction is straightforward.

Move the split by **a single point, to 56%**, a shift well inside ordinary negotiating range. The loan becomes $760,800, or 80.1%. It is **$800 over the line**, and mortgage insurance now applies to the whole $760,800.

That one point costs the extra $4,300 of equity *plus* a premium on the entire loan. At 57% the file is $5,100 over.

The same file shows the second failure mode. If the retaining party's income, assessed alone and after any maintenance paid, supports materially less than $756,500, the order cannot be performed from the day it is sealed. The first anyone knows is when the lender declines.

Five things worth confirming before the term is drafted

1. **Can the payment figure be funded at all?** Borrowing capacity on the retaining party's income alone, assessed the way a lender assesses it rather than on take-home pay.
2. **Where does the loan sit against the 80% line?** If it crosses, is there a source of funds outside the loan that brings it back under?
3. **What is the property worth to a lender?** A lender orders its own valuation and lends against that, not the figure the parties agreed. A lower valuation can move a file across the line on its own, without the split changing. Practice note 2 works through an example.
4. **Is child support formalised?** Whether it is assessed by Services Australia or privately arranged can decide whether a lender counts it as income at all. Lenders differ on this, and the difference can decide the file.
5. **How long will it actually take?** Valuation, assessment, formal approval, sealing, discharge of the existing loan and settlement, with room for one re-submission.

Drafting points

- **Build in time for a re-submission.** A declined application is not the end of a file, but a second lender needs weeks, not days.
- **Consider a fallback.** A term saying what happens if finance is not obtained, typically sale, turns a breach into a contingency the parties have already agreed.
- **Name the valuation basis.** If the orders fix a payment against an agreed value but the loan is sized against a lender's valuation, the retaining party may have to fund the gap in cash.
- **Provide for both the title and the loan.** Removing a party from the title does not release them from the loan, and releasing them from the loan does not change the title. Both need to be dealt with, and they settle together.

What we would need to see

A short list: the property address and the parties' view of value, the current loan statements, the retaining party's income evidence, any child support assessment or agreement, and a list of other debts and credit limits. A view can generally be given within a few days, before anything is committed to in the orders. A one-page checklist you can pass to your client is available.

Where we stop

We don't advise on the division of property, and we won't offer a view on what a split should be. That is your work, and the discretion involved is not ours to second-guess. What we can tell you is whether a given figure, on a given timeframe, can be funded, and what would need to change if it can't. Where the underlying issue is hardship rather than structure, we say so and refer clients to the National Debt Helpline on 1800 007 007.

Happy to look at a file before the term is drafted

No cost, and no obligation on your client to use us for the loan. If the figure can be funded we'll say so. If it can't, that is more useful to you than a referral.

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This note is general information for professional advisers. It is not legal, tax or financial advice, it is not credit assistance, and it does not take account of any particular person's circumstances. The worked example is illustrative and does not represent an offer, a quote or an assessment. Lender policy on valuation, mortgage insurance, maintenance income and the release of a party from an existing loan differs between lenders and changes without notice. Property settlement, duty and the tax treatment of any transfer are matters for the parties' lawyers, conveyancers and accountants.

Results vary depending on individual financial circumstances. Credit approval is subject to lender assessment criteria.

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