

CASE STUDY

CONVEYANCING: SALE & PURCHASE AGREEMENTS

SEARCHES



*Without a struggle,
there can be no
progress.*

Frederick Douglass

The Facts

In early January 2005, Firm A was engaged by a walk-in client, G. G informed Firm A that he had found the home of his dreams and had managed to negotiate a reasonable price of RM800,000 for the property. He now needed the firm to handle the Sale and Purchase documentation for him; he provided Firm A with the Vendor's details.

As G had been recommended to Firm A by friends; he stated that he was happy to leave the whole matter in Firm A's hands.

Firm A immediately contacted the Vendor to obtain details of the property. The Vendor verbally informed Firm A that the property was charged to Bank N.

Two weeks later, having obtained all the necessary documents from the Vendor, Firm A telephoned G to inform him that the Sale and Purchase Agreement (SPA) was prepared and the Vendor was ready to execute the SPA.

At the end of January, both Vendor and G met at Firm A's offices to sign the SPA. G paid a 10% deposit to the Vendor. Dates of completion were established, and as soon as Firm A provided G with a stamped copy of the SPA, G could apply for his housing loan.

At the time of the signing of the SPA, Firm A informed G that the said property was charged to Bank N for

the vendor's housing loan but this would not unduly affect and/ or delay the transaction. However, they failed to mention to G that the Vendor verbally relayed this information. They also did not advise G of any other encumbrances or restrictions on the said property. In fact, Firm A had failed to conduct a title search on the property prior to advising G to execute.

The Delay

Firm A only conducted a title search of the property in February 2005. This is when Firm A discovered that a third party had entered a caveat on the property. Firm A, however, did not immediately inform G.

A month later, Firm A wrote to inform G about the entry of the caveat and advised G to make an application to remove the caveat.

In the meantime, G was informed by a friend that the vendor had absconded with the 10% deposit.

Implications

Due to the presence of the third party caveat, G was unable to complete the SPA and purchase his dream home. G is now claiming from Firm A the deposit that he has lost and for damages arising out of the failed transaction. G is alleging that Firm A was negligent in failing to protect his interest and discharge their duties as his solicitors.

TRAPS THAT TRIP

The failure of lawyers to conduct title searches is one of the main causes of conveyancing claims.

In Firm A's case,

- ✗ *They failed to carry out a title search prior to execution of the SPA by G to ascertain whether the property which G intended to purchase was free of encumbrances, other than as disclosed by the vendor.*
- ✗ *Had they conducted the search prior to the signing of the SPA, the third party caveat would have been discovered, and Firm A would have been able to prevent G from paying the 10% deposit and signing the SPA.*
- ✗ *They failed to inform G immediately of the caveat entered on the title by a third party.*



Challenges are what make life interesting; overcoming them is what makes life meaningful.

Joshua J. Marine

TOOLS FOR THOUGHT

When conducting a title search, you should:

- ◆ Ensure that your Firm conducts searches at all important points of a conveyancing transaction, for example, prior to execution of SPA, prior to presentation of Transfer or Charge;
- ◆ Realise that various Registers/ Records need to be looked at for searches (Presentation Book, Caveat Book, Title, Prohibitory Orders)*;
- ◆ Ensure that the staff entrusted with the search job is trained and does not employ short cuts;
- ◆ Not assume, without reading the search, that it does not raise any issues for the client (therefore missing, for example, a judgment registered on title or a bylaw contravention notice);
- ◆ Read the search carefully and thoroughly (to avoid missing, for example, a “flag” such as a notation of “miscellaneous notes” that indicates a further search is required);
- ◆ Read the search and always keep clients informed of any developments in writing, you should not assume on behalf of the client that whatever is noted on title will not be an issue for him/ her;
- ◆ Not wait until the last minute to read the search and report to the client, leaving the client with insufficient time to deal with any issues that might arise. Delay on your part may limit your client's options.

Finally, firms should make it a policy to conduct a minimum of 2 searches:

- (i) At the inception/prior to signing of documents, and
 - (ii) Before presentation/completion of a transaction,
- regardless of whether the client has requested for it. It is your duty to protect the client.

* The practice of manual searches should be continued until and when the nationwide automation exercise by all Land Offices are completed.

IDENTIFICATION FACTOR

An important aspect in conveyancing is identification of the parties involved in a sale and purchase transaction.

We encounter many conveyancing claims in the Scheme involving impersonators and fraudsters. Some of these fraudsters have such elaborate plans in place that, with the help of various parties, unsuspecting lawyers can be easily be drawn into their plan.

Although such claims can be successfully defended, it may take years before a legal firm is freed from litigation, so it is better to try and avoid being drawn into litigation at all.



*Small opportunities
are often the beginning
of great enterprises.*

Demosthenes

TOOLS FOR THOUGHT

Do make sure that you:

- ◆ Obtain identification from parties involved in the transaction, whether you are acting for the Vendor or Purchaser;
- ◆ Insist on photo ID, for example, production of MyKad;
- ◆ Insist on an alternative photo ID (in addition to the initial photo ID provided), for example, driver's licence and/or credit cards;
- ◆ Keep a copy of the title documents, identification or photo ID in the client's file;
- ◆ Insist that each person produce a separate photo ID (if you're dealing with more than one client);
- ◆ Take copies of any agent or broker's IDs (if either an agent or broker is involved in the transaction). It is also prudent to meet with the broker in the presence of the Vendor and Purchaser;
- ◆ Insist on sighting the Title documents or a copy of it, whether you are acting for Vendor or Purchaser. It may also be prudent to request for utility bills as further proof;
- ◆ Conduct a title search prior to preparing the SPA, ensure the details of the Registered owner matches EXACTLY that in the ID given by the Vendor(s);
- ◆ As the lawyer in charge of the SPA, always insist on meeting with the parties personally, especially at the time of execution of SPA. As a lawyer your instincts to sniff out a scam/ problem/ note an anomaly may be better;
- ◆ Do not witness a signature if you were not present at the execution of the SPA/ documents;
- ◆ Advise your client, especially if you are acting for the Purchaser, not to sign the SPA if there are 'issues' with the title search. However, if he insists on proceeding, then advise the Purchaser clearly in writing of your advice. If necessary, ensure the deposit is held by a stakeholder pending clarification of the 'issues';
- ◆ Do NOT act for both the Vendor and the Purchaser;
- ◆ Verify the client's identity again at the point of execution of documents.