

Conveyancing Gone Bad

All names in the case studies are fictitious.

Claim 1: Duty of Care

In 1996, Andrew (Purchaser) purchased a piece of land in Selangor from Gilbert (Vendor) for RM300,000. Gilbert introduced Andrew to Rick & Co; and Andrew appointed Rick & Co to prepare the Sale and Purchase Agreement ("SPA").

Years later the state government acquires the land for development. At this time Andrew discovers that he is not the owner of the whole piece of land, in fact he only owns half of an undivided share of that land. Andrew sues both Gilbert and Rick & Co.

The Claim & the Court's Decision

Andrew's suit was for return of all the monies he had paid for the land. He argued that the SPA entered with Gilbert was void pursuant to s22 of the Contracts Act 1950 ("the Act"). He further argued that pursuant to s66 of the Act, he should be refunded the whole purchase price. In short Andrew wanted the SPA to be declared null and void as the state government had only compensated him RM215,000 for the half undivided share of the land.

Against Rick & Co, Andrew alleged that they failed to advise him on the legal status of the land and the fact that he was only purchasing half of an undivided share; he further alleged the firm had not conducted proper searches hence failing to protect his interest.

The slight twist here is that Rick & Co had also acted for Gilbert when he had purchased the land from the previous owner.

The court decided that Andrew's claim for restitution was untenable as there wasn't a total failure of consideration. Andrew was the registered owner of his half, although undivided; and he had received his share of the compensation from the state government. However since Andrew had proven that he had purchased the whole land but had only become owner of half, Gilbert was ordered to refund Andrew half the purchase price paid. *The court further ordered that Rick & Co was to indemnify Gilbert to the extent that Gilbert had to pay Andrew.*

Nuts & Bolts

It transpired during evidence that Rick & Co had relied on only one land search, the one carried out by them when they acted for Gilbert years earlier when he had purchased the land. Years later when Gilbert sold the land to Andrew and Rick & Co acted for Andrew as the Purchaser, they DID NOT conduct a new land search!



Best Practices

1. Conduct at least two searches for every SPA. One before preparing the SPA and another just before releasing the monies to the vendor.
2. Conduct a new search for every transaction to establish current ownership and status.
3. Request and sight original copies of the previous SPA, the title, identification cards and any other relevant documents to establish ownership and land status; make copies for your file.
4. ALWAYS cross check the land/title search results with the particulars in your file.
5. Use the conveyancing checklist and guidelines issued by Bar Council.



Claim 2: When the SPA and Memorandum of Transfer Differs

ABC Bank granted a credit facility of RM3.5 million to Z (the Purchaser/Borrower) to finance Z's purchase of an industrial land. At the time the facility was granted, Z had not signed the SPA, hence one of the conditions precedent in the Letter of Offer is that prior to disbursement of the facility, Z must provide ABC Bank a stamped SPA.

Z subsequently signed the SPA with the Vendor for RM3.5 million and gave the SPA to ABC Bank. ABC Bank then appointed the firm Hanim & Co to prepare the security documentation; upon completion and following Hanim & Co's advice, ABC Bank released the loan of RM3.5 million to the Vendor.

Shortly after the disbursement, Z defaulted on his loan to ABC Bank. In the process of recovering the loan ABC Bank found a 'discrepancy' between the SPA and and Memorandum of Transfer ("MOT"), in the SPA the land value was stated as RM3.5 million whereas in the stamped MOT it was RM1.2 million. Further, ABC Bank discovered that the land search provided by Hanim & Co was incorrect as the land was not converted for industrial use and the land office receipt was a forgery.

At this stage ABC Bank commissioned a valuation report which showed the value of the land to be RM1.2 million, on the assumption the land was converted to 'industrial' use and all premiums for the conversion were paid. Hanim & Co claimed that the purchase price in the SPA was based on a valuation report provided by Z.

The land was later auctioned and ABC Bank managed to sell the land at RM950,000.

What went wrong?

Hanim & Co, who also prepared the SPA, said that she was instructed by Z to state a lower sale price of RM1.2 million in the MOT; and that the reason given by Z is that they wanted to pay a reduced stamp duty.

ABC Bank sued Hanim & Co for fraud and negligence. The panel solicitor appointed to defend Hanim & Co advised that the claim should be settled on the following grounds:-

1. Hanim and Co as the lawyer representing Z in the SPA and representing ABC Bank in loan transaction failed to inform the Bank of the said variation in price/value.
2. Hanim & Co's appointment letter clearly required the firm to ensure all pre-disbursement conditions were met but they had failed to ensure that the land was converted to industrial use. Despite that Hanim & Co had given their advice to ABC Bank that their interest was protected.
3. Further the panel solicitor discovered that when the Vendor received the RM3.5 million from ABC Bank, the Vendor refunded 'the balance' to Z. This evidence if produced in Court would have been fatal to Hanim & Co's defence.

The Insurers settled the case out of court and Hanim & Co was imposed with an increased penalty excess of RM50,000 pursuant to Clause 11(b) of the Certificate of Insurance.



Best Practices

1. Do not deflate or inflate the SPA price and ensure the same value is reflected in the MOT.
2. Do not get involved in any side deals involving the Vendor and Purchaser.
3. If you suspect the transaction is not genuine, do not take on the file.



Claim 3: Who is Mr Seller?

Mr Stone and Mr Willis appointed Ben & Co to act for Mr Willis in the sale of his land. Mr Stone introduced himself as the land broker acting for Mr Willis; and informed Ben & Co that they have a potential Purchaser. Ben & Co informed parties that he will act for Mr Willis if he could produce the original title to the property. This was later provided to Ben & Co.

Ben & Co then wrote to the Purchaser's solicitor stating that he acts for Mr Willis and commented on the draft SPA. The parties signed the SPA (now called SPA1) and a deposit was paid by the Purchaser to Ben & Co, who later released the deposit to third parties on the instructions of Mr Willis.

A month later, the Purchaser discovered that Mr Willis had entered into another agreement (SPA2) to sell the same land to Purchaser 2.

The Purchaser also discovered that Mr Willis's NRIC number in SPA1 and SPA2 are different and that Mr Willis was represented by a different solicitor in SPA2. Later in a meeting held at the Purchaser's office, Mr Willis confessed that he was not the real landowner and that his real name is Murphy.

The Purchaser then sued Ben & Co for breach of warranty of authority as Ben & Co was, at all material times, acting for a fraudster and not the real landowner.

The panel lawyer appointed to defend Ben & Co in the Suit advised settlement on the following grounds:-

1. The case of *Lau Tek Sen @ Lau Beng Chong & 3 ors. v SK Song* [1995] 2 CLJ 425 is the authority on solicitor's breach of warranty; and this case is very much against Ben and Co.
2. Further, in *Yonge v Toynbee* [1908-10] All ER 204, a claimant suing on such a breach of warranty need not demonstrate mala fide on the part of the defendant.
3. There was no clause in the SPA or any confirmation from the Purchaser's solicitor that allowed Ben & Co to release the deposit monies to the third parties.



Best Practices

1. If you receive instructions to release funds held by your firm to third parties especially parties not involved in the transaction, your alarm bells should start ringing!
2. Satisfy yourself that you are acting for the real owner of the land, besides the title there are other documents you can ask to sight as proof of ownership.
3. Do not provide a warranty on behalf of a client until you are fully satisfied who you are representing.

Claim 4: The Devil is in the Details

B (the Purchaser) appointed the firm of Sparrow & Co to represent him in the purchase of a property from D (the Vendor). Prior to Sparrow & Co's appointment, B and D had agreed among themselves the terms and conditions of the transaction.

B provided all documents he received from D to Sparrow & Co with instructions to prepare the SPA. The SPA was later signed and the property duly transferred to B.

B later discovered the actual size of the property is smaller than the size stated in the SPA. Sparrow & Co upon checking their file realised that they had prepared the SPA using the details in the property agent's letter and not the details in the land title. Upon this discovery Sparrow & Co did not advise B of the options available.

However since B's purchase price was based on the size of the property, he sued the D to recover the excess purchase price paid but lost the suit. Following that outcome, B sent a notice to Sparrow & Co alleging that the firm was negligent in preparing the SPA.

Sparrow & Co notified Insurers and requested Insurers' consent to amicably settle the dispute. Sparrow & Co admitted that they were negligent as they had not ascertained and followed the size of the property as stated in the title document. They concluded that their error caused B to overpay for the property.

The panel lawyer appointed to advise Insurers and assist Sparrow & Co agreed that it would be better to settle the dispute on the following grounds:-

1. That Sparrow & Co owed a duty to B to ensure that the details in the title document matched that in the SPA.
2. Further when they discovered the discrepancy in the size they should have immediately advised B so that B could make an informed decision whether to proceed with the purchase.
3. That B as the buyer was also responsible to check what they are buying and their failure to do so was a factor that could be used to negotiate an early settlement at a reasonable sum.

The calculation of the per square feet price showed that B overpaid RM 400,000 for the property and B demanded that sum from Sparrow & Co. The Insurers settled the case out of court for half that sum.



Best Practices

1. Check that every detail of your official land search and those in the land title matches that in the SPA. There must be no discrepancy.
2. Notify your Insurers as early as possible as this will allow parties to negotiate an early and reasonable settlement.