

CONVEYANCING – TRAPS AND PITFALLS

1. My simplistic view of the role of a solicitor in a conveyancing transaction is to ensure that his or her client gets exactly what they thought that they had bargained for. The vendor's solicitor has a relatively simple role – to get their client the price bargained for when it has been bargained for. The purchaser's solicitor's role is however more fraught with potential risks. The purchaser's solicitor must ensure that the purchaser gets good title to the property that his or her client has purchased.
2. The conveyancing procedure for the vendor's solicitor which I am sure that all of you are aware of, if followed carefully, should ensure that this result is achieved or at the very least, alert the purchaser that there are potential problems to the title for the property. I am not going to go through the conveyancing checklist in detail for 2 reasons. First, I am sure that all of you would have access to a conveyancing service which have very detailed checklists for both purchasers and vendors and secondly, I think that it would be far more useful for you if I go through recent cases where the solicitors have found themselves in trouble.

DOES YOUR CLIENT HAVE THE MENTAL CAPACITY TO ENTER INTO THE CONTRACT?

3. Before you take on the retainer, be sure that your client has the mental capacity to enter into the contract.
4. In the matter of **James v Gain** [1998] NSWCA 115, the appellant, as executor of the estate of Keith Arkinstall, deceased, brought proceedings in negligence against the respondent, a solicitor, in respect of a conveyancing transaction in which the deceased sold his property at Gundagai, at a time when he suffered

from an advanced state of dementia. The Court of Appeal disagreed with the Trial Judge's finding that it had not been established on the balance of probabilities that the respondent "knew or ought to have known that [the deceased's] mental condition was such that he was not capable of properly understanding the transaction". It seems that after the transaction commenced, an order had been made by the Protective Division of the Court declaring that the deceased was a person incapable of managing his affairs. It was held that there was evidence which pointed strongly to the finding that, at the least, the solicitor ought to have known that the deceased did not have the mental capacity to enter into the contract for sale. The court did not specify the substance of the evidence. It is therefore unclear as to whether the solicitor knew about the order. However, the appeal failed because there was no proof of damage. The property was sold at its lowest valuation of \$10,000, rather than for a potential \$15,000. The trial judgment held that the price at which the property was sold was the price which a willing, but not anxious buyer, was prepared to pay.

KNOW YOUR RETAINER

5. Once you have overcome that initial hurdle, it seems to me that it is important for a lawyer to understand exactly the extent of his retainer. Without this basic knowledge, it would be difficult for the lawyer to discharge his duty in a competent manner.
6. In **Humphries v Cooke** [2009] NSWSC 1250, the defendant solicitors acted for the plaintiffs' vendor in respect of the sale of their property to Comsand. The plaintiffs executed a deed of option which incorporated a contract for the sale of the property to Comsand at its option. A condition of the contract was that any sale would be subject to development consent from Shoalhaven City Council

within 12 months of the date of the contract for subdivision of the property. Comsand consequently rescinded the contract. The plaintiffs claimed that through a breach of retainer and negligence, and further or alternatively misleading and deceptive conduct by the solicitor, they suffered loss of the bargain in the sale of their property to the company. The defendants disputed the extent of the retainer, which was pleaded to include providing advice on the development approval for subdivision of the property. The main issue arising in these proceedings was causation of damages. The focal point of the defendant's argument was that even if there had not been a breach of duty on their part, Comsand would have been entitled to rescind the contract and recover its deposit. Price J held that the defendants' retainer did not extend to providing advice on the development approval, nor did they have an ongoing obligation to monitor it. No breach of duty of care was found relating to the defendants' ongoing supervision of the development application. However, it was found that solicitor Mr Cooke had breached his duty of care by failing to exercise the reasonable care and skill of a solicitor who was acting for the vendors in the sale of a property by failing to inform the plaintiffs that the last day for obtaining development consent was 21 June 2006 (not 22 June). If the solicitor had advised the vendors of the critical nature of the date of 21 June 2006, the vendors might have been able to obtain DA within the 1 year period. The vendors therefore lost the opportunity to comply with this condition in the deed of option. No conduct was found to be misleading or deceptive. However, the plaintiffs failed to establish on the balance of probabilities that the defendants' breach of duty caused any of the harm of which complained; thus the claim for damages was dismissed on this occasion. Nevertheless, the breadth of retainer must be understood from the outset to prevent legal action.

REVIEW YOUR CONTRACT

7. While I am not going to go through the checklist in detail, I must mention that there are a lot of ‘failure to warn’ cases in the law reports. This indicates to me that many lawyers for purchasers are not taking the time to review their contracts, the results of the searches carried out and maybe even the answers to requisitions.

8. The decision handed down by the Supreme Court of Tasmania in **Cohen v Wilson Dowd (a firm)** [2001] ANZ ConvR 285 illuminates this lesson. The question arising on appeal was whether the respondent solicitor was negligent in failing to advise the Cohens that they could have rescinded the contract for purchase and returned to their own property. This case involved a solicitor who took no instructions to ascertain facts relevant to any election, estoppel and/or waiver that may have occurred; gave the clients the clear impression that they could not resist threatened action to specifically enforce contract, after having conducted no legal research as a prudent practitioner would. Consequently the Cohens arranged bridging finance and completed the purchase on this advice resulting in a significant financial loss to the Cohens. If the solicitor had taken the trouble to take instructions and had been familiar with the fundamental issues and principles of law applicable to the work that he had agreed to undertake, then he would have advised the Cohens that they were not obliged to comply with the notice to complete but were instead entitled to rescind the contract. The Court found the solicitor negligent and gave judgment in favour of the Cohens.

9. **Bebonis & Anor v Angelos & Ors** (2003) 56 NSWLR 127; [2003] NSWCA 13 was an appeal, allowed in part, from a decision of the Trial Judge dismissing the claim for damages for negligence. The defendant solicitors Angelos acted in respect of a conveyancing transaction. The Court of Appeal considered whether a duty of care existed in respect of answers to requisitions for title, and whether such answers to requisitions on the title were negligent. It was found that, first, in answering the requisition, the solicitor owed a duty of care to the purchaser although he was acting for the vendor, Bebonis; and second, the Trial Judge's finding that the vendor also owed the purchaser a duty of care and breached that duty was open on the evidence.
10. The case of **Hatzitanos v Jordan** [2005] NSWSC 763 involved a plaintiff who purchased property for development, the proposal for which was rejected for heritage reasons. The plaintiff made a claim for damages alleging the defendant solicitor executed the conveyancing transaction negligently, arguing that they had failed to warn of the potential heritage problem. In defence the solicitor argued that the scope of the retainer excluded advice regarding any heritage listing, since the material given to the defendant contained no suggestion of heritage issues affecting the property. The defendant notified the plaintiff that there were heritage buildings present on the property. The plaintiff failed to prove that the solicitor did not provide warning that expert advice was needed. Hislop J held that the defendant had no duty of care to warn of heritage complications as no reliance was found; further a prudent practitioner would appreciate the general risk of development and suggest the plaintiff acquire expert advice, which the solicitor did. There was insufficient evidence to prove the contract would not have proceeded had the plaintiff been fully aware of associated risks. No breach was found.

11. In **Gilson v Flamingo Enterprises Pty Ltd** [2010] QSC 53, the purchaser entered into a contract to purchase a residential apartment from Flamingo Enterprises which Flamingo Enterprises intended to develop. The contract contained a number of special conditions. In particular, a special condition provided that “the positioning of the unit must provide unobstructed ocean views”. It was held that the special condition was a fundamental or essential condition of the contract. Flamingo Enterprises did not deliver and the purchaser was entitled to terminate the contract for breach of a fundamental term.
12. In some cases, it may even be important to ensure that a draft contract accords with the final contract.
13. **Taluja v Ardino** (2002) ANZ ConvR 3 arose out of a conveyancing action where the plaintiff alleged breach of duty of care against the defendant solicitor, in both failing to advise, and to make adequate inquiries, prior to exchange taking place. The plaintiff alleged that the defendant’s solicitor had not advised her in relation to:
 - (a) the property was in a noise affected area from the proposed Badgerys Creek second Sydney Airport;
 - (b) the property had no vehicular access by road to it and relied upon the goodwill of the trustees of the Roman Catholic Church for the Diocese of Parramatta (the trustees) being the registered proprietors of Lot 1 in Deposited Plan 195955 and known as St Francis Xavier Cemetery, Greendale Road, Wallacia for access by a vehicular road to the property;
 - (c) was subject to electricity easement for services;

(d) was subject to contemplated changes by the Local Government authorities as to the terms of any development on the property;

(e) was subject to contemplated changes by the Electricity Commission as to the use of the existing easement.

14. The plaintiff claimed the solicitor failed to advise of her right to rescind the contract for the sale of land, after exchange but before settlement. She alleged that a sufficient difference existed between a certificate annexed to the contract pursuant to s149 of the Environmental and Planning Act (1979) and a certificate under the same Act and section, obtained after the contract had been delivered to the defendant which was inconsistent with the certificate annexed to the contract. Further the plaintiff argued that a letter, which had been received from the Electricity Commission (Elcom) relating to a proposal that power transmission lines might be placed upon the subject land, gave rise to a right for her to rescind. The solicitor gave evidence that he received his initial instructions from the client by telephone; after receiving the contract from the plaintiff he had a lengthy conference face-to-face with her at his office and subsequently made a file note; prior to seeing the client he had read the contract in detail and marked those matters on the contract which he wished to discuss; he deposed that he discussed the question of subdivision and the difficulties in doing so with the plaintiff, and discussed the contents of the s149 certificate with the plaintiff. It was his evidence that he drew the plaintiff's attention to the certificate which revealed that the subject property was in a noise affected area from the proposed airport, but told her he could not advise further without carrying out full investigations. The plaintiff instructed him not to do so. Newman AJ held that the plaintiff had no right to rescind on the basis of the discrepancy between the two certificates, and

the second ground of the plaintiff's claim regarding the letter also failed, as the proposition in the letter was not a proposal but merely an investigation that was being undertaken. The defendant was not found liable for breach of duty of care.

ORDER ALL RELEVANT SEARCHES AND CAREFULLY REVIEW THE RESULTS

15. In **Wilson v LIBL** (1996) 16 Qld Lawyer Reps 114, the defendant solicitor acted for the plaintiff in the purchase of a business. The plaintiff argued the solicitor acted negligently and breached its duty of care to conduct searches, since it failed to carry out a standard search of the Council's records relating to the site on which the business was located, which would have disclosed planned road works.

Closing the access into a restaurant carpark meant the land was "affected" by a proposal of the Main Roads Department. The question in issue was whether the plaintiff would not have entered into the contract had he known of the planned road works. Botting J of the Queensland District Court held that the defendant failed to attain an appropriate level of care required by the circumstances. The plaintiff was entitled to recover all moneys outlaid to purchase the business, not merely the difference between the price paid and the real value of what was acquired.

16. Additionally, the case of **Scarcella v Lettice** [2001] ANZ ConvR 462 reinforces the importance of carrying out all relevant searches. This dispute involved a solicitor who acted for clients on a property purchase, where access to the back of the property was by 'right of way' passing through two adjacent lots. The clients discovered 12 years after the purchase that they did not have right of way over one of the adjacent lots. The solicitor was found negligent in failing to obtain all searches required to establish whether plaintiffs would obtain legal access to the

rear of the property. Also, the solicitor failed to discover the defect in title, where following normal conveyancing procedures would have revealed otherwise.

ACT EFFICIENTLY

17. **York v Mazey** [1997] ANZ ConvR 585 involved a claim brought by a mortgagor that the defendant solicitor acted negligently, by causing delay in the completion of the conveyancing transaction, which resulted in increased interest on a loan. The question arose as to whether the mortgagor's solicitor breached their duty of care by not immediately contacting the mortgagee's solicitor upon acceptance of the offer of the loan. Further, it was argued that the solicitor was under a duty to act with promptness to place the client in a position to settle on the most commercially advantageous date, and that the delay in settlement was caused by the conduct of the solicitor in failing to promptly make searches and obtain consent of the previous mortgagee. It was held that there was no breach of duty in failing to contact the mortgagee's solicitor, and that only a short delay was caused by the failure to make prompt searches.

KNOW THE LAW

18. **Berrivale Orchards v Blakes** [1996] ANZ ConvR 257 (Special Leave to HC refused): This case involved a transfer of Crown leasehold land. The vendor plaintiff claimed the solicitor defendant breached their duty of care, by failing to inform the vendor of the requirement to obtain ministerial consent prior to the contract's date of settlement. The vendor granted the purchaser an extension of time to complete the contract on certain conditions, on discovering the need to obtain consent, and the purchaser subsequently rescinded the contract due to consent not being obtained. The question arose as to the extent to which the

solicitor's failure to advise vendor of need to obtain consent, and failure to apply promptly for minister's consent, constituted a breach of duty of care owed to the client. It was found that the solicitor's negligence was causative of the loss of commercial opportunity and loss of contract suffered by vendor. Damages were assessed on the basis of a 55% likelihood that the purchaser would have concluded the transaction, having taken into consideration their willingness to complete the contract.

19. In **Livingstone v Mitchell** [2007] NSWSC 1477 (affirmed in the CA, [2008] NSWCA 305), the defendant solicitors were retained by plaintiff-purchasers in a conveyancing transaction. The plaintiffs purchased the subject property to redevelop and sell in the short term. Prior to sale, owner-builder work was undertaken on the land but no certificate of insurance was attached to the contract. The plaintiffs had a right under the Home Building Act to rescind the contract due to the absence of the said certificate. The defendants failed to ensure that the contract for sale had the certificate of insurance attached, and further failed to advise client of their right to rescind the contract on this basis. The plaintiffs obtained a pre-purchase inspection report and it was deemed the work on the land was defective. The defendants admitted breach of duty. The question of causation arose, namely, whether the plaintiffs would have proceeded with the purchase had they known of the right to rescind. The plaintiffs said that they would have but Walmsley J did not accept this. Instead the judge found that the plaintiffs would have completed the sale but have negotiated \$10,000 off the purchase price. Walmsley AJ found the solicitor acted negligently and judgment was entered for \$10,000 plus interest.

ACT WITHIN INSTRUCTIONS

20. It is generally not advisable when acting for a purchaser to advise a client to release the deposit monies prior to settlement. However, more complex situations may arise as to when the purchase price may be released.

21. **Patterson v Bruinsma & Ors** [2004] NSWCA 279: This matter dealt with an appellant solicitor (Patterson) who acted for more than one party in a complex development agreement and without client instructions (in releasing the purchase price). Patterson acted for both the developers, Mitchell Classic Homes Pty Ltd, and the homeowners, Bruinsma and Mansfield. Bruinsma and Mansfield owned two adjoining properties in NSW and entered into an agreement with Mitchell Classic Homes Pty Ltd to redevelop the properties and construct 5 townhouses on them. Mitchell Classic Homes retained Patterson to act on its behalf. Patterson offered to act for Bruinsma and Mansfield (to save them a buck or two). He thought that the fee quoted by their solicitors to peruse the contracts was excessive and as he had to peruse the contracts at any rate, he would be able to help them out for a far more modest fee. Patterson did not give Bruinsma and Mansfield any advice or warnings on the possible implications or difficulties arising from acting for them as well as Mitchell Classic Homes. Patterson released the purchase monies (without instructions) to Mitchell Homes. In an action brought against Bruinsma and Mansfield for damages arising from a breach of contract by one of the buyers of the townhouses, Bruinsma and Mansfield successfully cross-claimed against Patterson on the basis that he had been negligent in the conduct of their affairs by releasing the purchase monies without instructions. Patterson was required to provide them with an effective indemnity for the consequential damages they had suffered. Patterson appealed that decision.

The Court of Appeal agreed with the Trial Judge’s decision that the appellant solicitor should have taken steps to ensure that the whole proceeds of the sale of the townhouses were properly dealt with, or such part as necessary to obtain a partial discharge of the GIO mortgage to enable clear title to be given to the buyers. Patterson breached his retainer, first by failing to properly advise the respondents and to obtain client instructions with respect to the proceeds of sale; and second, by failing to properly advise Bruinsma and Mansfield when they executed their contracts on Special Condition 28 which provided:

“28.4 As security for and in consideration of the advance of the purchase price made by the Purchaser to the Vendors:

28.4.1 the Purchaser acknowledges that the Vendors have reduced the purchase price from \$440,000.00 to \$390,000.00;

28.4.2 the Vendors procure that Grant Lee Mitchell and Marion Mitchell grant to the Purchaser an unregistered second mortgage over the whole of Folio Identifiers- 13/608269 subject to a registered first mortgage St George Bank for a principal sum of \$140,000;

28.4.3 the Vendors will not borrow any further capital for the development of the project site;

28.4.4 the Vendors will procure that Starconia Pty Ltd in its capacity as trustee of the Mitchell Family Trust will grant an unregistered third mortgage over its one quarter interest in that property known as 151–155 Showground Rd, Castle Hill being the whole of the land in Folio Identifiers 1/124529 and 10/15186;

28.4.5 *the securities referred to in subcl 28.4.2 and 28.4.4 above will be collateral to one another and collateral to this contract.”*

22. The obligations incurred under subcl 28.4 were very extensive, and quite remarkably unusual; but the manner in which exchange was effected meant that Bruinsma and Mansfield were obligated by these clauses although they had never heard of them.
23. This led to the respondents’ exposure as to the unauthorised disposition of the whole of the purchase price, and as a result, they lost an opportunity to be protected against their mortgage debt. Further, the Trial Judge held that the respondents’ default and liability for damages to Stein, one of the purchasers of the townhouses, was caused directly by Patterson’s breaches of his duties, as well as his failure to achieve the usual standards of an ordinary prudent solicitor acting in such a transaction. The Appeal was dismissed, on the basis that no error was made by the Trial Judge in finding a breach of duty of care to the homeowners owed by Patterson.

CAVEATS vs TITLE INSURANCE

24. Even if the purchaser’s solicitor has been diligent in all of the steps involved in the conveyancing process, the purchaser’s title is still not secure until registration. You will all be aware of the case of *Black v Garnock* where a purchaser’s title was postponed when a writ of execution was registered against the title of the property prior to the registration of the transfer. While it is prudent for purchasers to lodge caveats against the title of the property on exchange of contract, it does not appear to be common practice for this to occur.

25. In my view, it is prudent to lodge a caveat against the title of a property whenever the caveator holds a legitimate equitable interest in the property. This way, the caveator and owners of the legitimate equitable interest will be notified every time a dealing is sought to be registered against the title of the property. In addition, registration of a dealing which might have the effect of postponing the purchaser's interest would not be possible so long as the caveat remains on the title of the property.

Purchaser's title insurance

26. Purchaser's title insurance is now available in Australia and is provided by First Title Insurance and Stewart title insurance. It covers the purchaser from the date of settlement to the date of resale of the property for a one-off premium paid at the date of settlement. It typically covers the following risks:

- (a) illegal building works / structures
- (b) mortgage or title fraud after settlement
- (c) incorrect signature of a document
- (d) forgery, fraud, duress, incompetency, incapacity or impersonation prior to settlement
- (e) defective registration of a document
- (f) lack of rights of access or use of services
- (g) breach of covenants
- (h) survey cover for boundary issues
- (i) encroachment by or on to the insured property
- (j) lack of zoning certificates
- (k) title being vested in someone other than the insured

- (l) problems with the registration gap (eg. issues arising in *Black v Garnock*)
27. The Title Insurer will also defend any challenge to the insured's title, and if ultimately unsuccessful, will indemnify the insured against their loss if an insured risk occurs.

CONCLUSION

28. As you can see, there are many avenues for a conveyancer to fall short of his duties. Even if the conveyancer has attended to all of the following:
- (a) Ensuring the mental capacity of your client;
 - (b) Knowing the extent of your retainer;
 - (c) Carefully reviewing the contract;
 - (d) Carrying out relevant searches;
 - (e) Reviewing the results of the searches and advising your clients of any remedies that they might have if the searches reveal that the vendor is unable to pass on good title;
 - (f) Knowing the law so that you can advise your client of their entitlements;
 - (g) Behaving in a timely manner so as not to delay the completion of the contract; and
 - (h) Acting within your instructions,
- the risk still remains that the purchaser will not get good title.
29. Caveats have been and continue to be the traditional way in which holders of equitable interest in real property can protect their interest in the land. Not only is the Registrar-General compelled under the *Real Property Act* to notify the caveator in the event of any dealing that is sought to be registered against the title, the Registrar-General is also prevented from registering any dealing so long as the

caveat remains enforced.

30. While title insurance is important, and can protect the interest of lenders and purchasers, it is not the complete solution. Purchaser's title insurance only protects the owner from the date of closing. It therefore still leaves the purchaser open to the risk of competing legal or equitable interests that are created prior to the date of settlement. If it should happen that the purchaser's equitable interests are postponed to another equitable interest created either before or after the date of exchange then this again exposes the purchaser's solicitor to the risk of professional negligence proceedings. As a result, the inevitable conclusion seems to be that the only way that a legal practitioner can discharge their duty to exercise reasonable care and skill to the client purchaser in relation to the protection of title between settlement and registration is to fully advise the client purchaser of:

- (a) the benefits and risks of not lodging a caveat against the title of the property; and
- (b) the availability of purchaser's title insurance from the date of settlement and the risks that it covers.

31. If the client in those circumstances is still prepared to bear the risk of a defect in title then it is a matter for the purchaser, and the purchaser's solicitor can rest easy that he has covered his bases. However it may not protect the purchaser's solicitor from an action for professional negligence. In my view, the purchaser's solicitor can only be said to have discharged his duty to his client if he had:

- (a) advised his client of the benefits and risks of not lodging a caveat against the title of the property; and
- (b) obtained the instructions of his client not to lodge a caveat against the title of the property.