

How to avoid the traps

PRACTITIONERS PLAY A CRUCIAL ROLE WHEN ACTING FOR THE BUYERS OF LAND. NO TRANSACTION IS THE SAME, AND PRACTITIONERS NEED TO BE AWARE OF WHERE THINGS CAN GO WRONG. **BY CAROLINE DEW**

Acting on behalf of purchasers of land is a common occurrence for many practitioners. Most of the time the transaction runs smoothly with the client becoming the new owner of exactly what was intended. However, not every transaction is the same and practitioners need to be wary of what can go wrong. The practitioner's role when acting for a purchaser of property is to obtain clear title to what the client intended to purchase. Checklists and precedents are helpful tools but it is important that practitioners view each transaction and each parcel of land as unique.

I do not act in conveyancing matters, but often act on behalf of practitioners who have been sued as a result of an unhappy conveyancing outcome. This article aims to highlight some of the ways in which errors are made and how they could have been avoided. While conveyancing is largely process-driven it is important for the practitioner to step back, look at the transaction, and ask questions.

What does the client want?

Practitioners are often instructed to act for purchasers simply by being provided with a copy of the contract of sale. However, it is important to ascertain from the client what they intended to buy (ie, the location, boundaries, dimensions, accessory units) and ensure that their intention is reflected in the contract.

It is equally important to ascertain what the client intends to do with the property. Do they intend to develop the property? Or use it for a particular purpose?

Put simply, ask the client:

- what they think they have bought
- in what capacity they are intending to buy it (eg trustee, tenants in common)
- what they intend to do with the property.

The client's intentions need to be kept in mind throughout the transaction and should inform what particular searches and inquiries need to be undertaken and what advice should be given beyond the usual.

The land: review the contract and s32

Obviously any successful transaction will start with a careful reading of the contract documents. Even if the documents are in standard form practitioners must be familiar with the terms and carefully review any special conditions.

It is certainly advisable for practitioners who act in conveyancing to have a precedent "first letter of advice" to purchasers. It is a cost-effective way of providing advice and an important risk management tool.

However, as with all precedents, care must be taken to ensure the precedent is adapted to the specific matter.

While not an exhaustive list, a purchaser client should be advised:

- what the contract provides they are buying. It might be different from what they think they are buying
- what the vendor's statement and attached searches show
- what further searches should be undertaken in terms of title, encumbrances (registered and unregistered), appurtenant and restrictive easements, zoning (and what it means), recent construction
- to measure the property and its distance from a reference point such as the nearest intersection to fix its location. While many clients may ignore this advice a future claim against the practitioner may be avoided by this simple recommendation
- If any cooling off period is still applicable
- Whether the contract is conditional or unconditional and any critical dates
- Whether the client has any right to rescind the contract due to any defect in the s32 statement;
- any GST issues.

An example of a failure to advise about the land is set out here.



The practitioner had acted for a client who had bought several residential properties as investments, all of which had been rented out to tenants. On this occasion the practitioner was instructed to advise the client in relation to the purchase of a residential property next door to one of the client's existing properties. The practitioner failed to inform the client of the existence of a single dwelling covenant on the assumption that the client again intended to simply rent out the premises to tenants. However, the client claimed it intended to demolish both premises and undertake a multi-dwelling development, which it was prevented from doing by the restrictive covenant. The client was successful in applying for the restrictive covenant to be removed but sued the practitioner for loss of profits for the years it took for that to occur.

Searches

Claims against practitioners arise because the practitioner fails to undertake searches or inquiries which the client later alleges would have revealed information which would have given the client a right to rescind.

Practitioners routinely undertake the "usual" searches, but the type of searches you carry out should depend on the type of land being bought and the client's intended use.

From a risk management perspective it is advisable for practitioners to apply for a full set of certificates, particularly if the certificates attached to the vendor's statement are incomplete or "old". There is no standard definition of what makes a certificate "old" but three months is sometimes used as a rule of thumb.

It is advisable for practitioners to carry out their own searches, even if a certificate is attached to the vendor's statement. For example, when acting for a purchaser you should always obtain a land tax certificate. If the land tax later increases, under s96(4) of the *Land Tax Act 2005* (Vic) a bona fide purchaser is only liable for the amount shown in the certificate, but only if the purchaser obtained the certificate.

Claims are made against practitioners for failing to carry out

searches such as building certificates and information statements, which can reveal an encumbrance, such as an easement or drainage, not shown on the certificate of title – or even the likelihood of an encumbrance the clue for which was that there was a water utility asset nearby but in line with the property being purchased.

Sometimes searches are not undertaken because the client does not want to pay for them. In that scenario, practitioners should provide advice in writing to the client recommending the searches be undertaken and explaining the potential consequences of not doing so. A prepared letter, which can be adjusted to the circumstances, is a good risk management tool. The client's instructions not to proceed should be confirmed in writing.

Of course, searches could reveal information which might prevent the client from carrying out their desired objectives with the property, but does not necessarily give the client a right to rescind the contract. While the client might not suffer any loss that can be claimed against the practitioner, it is obviously preferable to the client that they find out about any issue affecting their intention with the property sooner rather than later and the practitioner will be, or at least should be, thanked for it.

Examples of errors practitioners have made in acting for purchasers include:

- failing to provide advice on matters such as zoning, planning or restrictive covenants which prevent the client from using the property as they intended
- failing to detect or advise the client of easements (registered or unregistered) or covenants which prevent the client from

SNAPSHOT:

- The solicitor acting for a purchaser of land is carrying out a crucial role.
- Be sure to understand the client's intentions and keep them in mind throughout the transaction.
- Every piece of land is unique. Be curious about the property and ask questions.

Land purchasers

- developing or renovating a property as they intended
- failing to identify issues with the vendor's statement, particularly as to whether services are connected
- obtaining searches but failing to properly review and advise the client as to the results of those – the job is not complete by having ticked off that all searches have been received and filed
- Failing to advise the client of any discrepancies with the searches attached to the vendor's statement which could provide the client with a right to rescind, which they later claim they would have exercised if properly advised.

Some examples:

1. The client bought a residential property with a large extension on the rear of the house. The vendor's statement stated that there were no building approvals in the past seven years. The client knew from inspecting the property that the extension appeared quite recent but did not appreciate the issue. The practitioner did not obtain any instructions in relation to the property, did not apply for a building approval certificate and did not advise the client of the reasons for not doing so. After settlement, the client discovered the council had issued a notice requiring the demolition of the extension and the client sued the practitioner.
2. The client bought a property with the intention of demolishing the single dwelling and constructing several townhouses. A search revealed an easement not shown on an old plan attached to the vendor's statement, but the

practitioner failed to bring this to the attention of the client so that the client lost its right to rescind. The easement prevented the client from carrying out its intended plans to develop the property, which had to be revised to a less profitable development.

Contract becomes unconditional

The most common reason a contract of sale is conditional is usually a "subject to finance" clause. While this is reasonably common, clients and practitioners can be caught out by these provisions.

The first advice provided to the client should note the date on which the contract becomes conditional and what is required to be done if, for example, finance is not obtained before the due date. It should also clearly explain the consequence of not complying with the provision, that is, that the contract becomes unconditional if notice to terminate the contract is not given to the vendor within time.

If a client instructs that it has obtained finance, if possible obtain a copy of the finance approval before the contract becomes unconditional to ensure the finance approval is final, not conditional and for a sufficient amount. If the finance approval is not final, consider obtaining an extension so that the contract remains conditional. Any extension should be agreed in writing.

Common mistakes made by practitioners include:



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- failing to notice, or check, that an approval letter for finance is subject to valuation, which when received is too low for the purchaser's requirements, by which time the contract is unconditional
- failing to realise that the amount approved is less than what will be required at settlement
- failing to advise the client of the need to give notice to the vendor in writing by a specified time if finance cannot be obtained
- failing to advise the client of the consequence of the contract becoming unconditional
- failing to follow up any request for an extension of the subject to finance clause within the time in which the clause expires to ensure the extension is granted
- ensuring that proper notice is given in accordance with the contract to bring it to an end if finance is not obtained or an extension in writing provided.

Some examples of failing to properly advise as to the practical effect of a subject to finance clause:

1. Upon being instructed, the practitioner wrote to the client advising of the date by which finance needed to be approved and requested that the client notify the practitioner of the position before the due date. The practitioner did not advise the client of the consequence of not providing those instructions within time and the need to give notice to bring the contract to an end. The finance approval received by the client was too low to complete the contract but he delayed

in instructing the practitioner on the mistaken assumption that the contract simply came to an end on the due date if finance was not obtained. The client said had he been aware of the consequences, he would have notified the practitioner immediately.

2. A purchaser client instructed the practitioner that he had negotiated an extension of a "subject to finance" clause directly with the vendor. The practitioner did not confirm that with the vendor's solicitor. The client was unable to obtain finance but when he sought to end the contract, the vendor claimed there were certain conditions to the extension which had not been met and the contract had become unconditional.

Conclusion

Unfortunately there are many traps in conveyancing. However, most can be avoided by a few simple steps:

- Take full instructions from your client and approach the transaction as unique and with their intentions in mind
- Adopt an attitude of being curious about the property and undertake searches and inquiries as are necessary in the circumstances. ■

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