

## CONVEYANCING – PURCHASE OF PROPERTY

It is often stated that the purchase of a house is the largest investment most people will make in their life time. There is fortunately a large body of both statute and case law to assist purchasers of real estate to ensure that a good title is obtained and the real estate can be used for the purposes for which it is purchased. Obviously to obtain the protection of the relevant law purchasers need to be aware of it and utilise it.

The common belief that signing of the Contract and a Transfer are all that is involved in a real estate purchase thus ignores the vast majority of the steps which need to be undertaken in any real estate purchase transaction to avoid pitfalls which could result in the loss of many thousands of dollars.

In this article I propose to deal with the subject under the following headings:

- 1 Pre-Contract Enquiries
- 2 Post Contract Enquiries and Procedures

### **PRE-CONTRACT ENQUIRIES**

It is important to obtain advice as to the manner in which a property ought to be purchased. An investment property ought to be purchased and funded in the manner best structured to gain the greatest benefit for the investor after taking into account the factors of such as rental income, capital appreciation, cash flow, income tax and capital gains tax. The question of insulating a property or properties from other assets by purchasing through different entities also needs to be considered. For a residence, the question of whether purchase ought to be in the name of a couple or perhaps one only (so as to protect the asset from creditors of the other) and the question of whether joint ownership should be as joint tenants or tenants in common (which types have different consequences on death of one party) also should be considered.

Generally, once you have signed the contract you are thereby bound to perform your obligations under it or face a liability to damages from the other party. However, in certain circumstances purchasers of real estate are allowed a “cooling off” period. Also where your ability to purchase is dependent upon taking finance or previously selling a property you own, these should be written in to the contract of purchase.

Although some purchase contracts are conditional upon the purchaser obtaining finance, selling other property or the occurrence of some other event, most vendors are not prepared to sell other than unconditionally. Certainly if a property is purchased at auction it will always be unconditional and accordingly purchasers should protect themselves against the risk of not obtaining any necessary loan or failing to sell a property needed to be sold to provide the whole or part of their purchase funds. It is prudent and in the writer’s view absolutely necessary, for a prospective purchaser who will require funds, to approach a lending institution and obtain assurances that a loan of the required sum will be approved and that the funds will be available in time to complete the purchase. Such assurances will always be conditional upon valuation of the premises to be purchased but all other requirements for

approval should be demonstrated to have been met before purchase actually takes place. Should the prospective purchaser require to sell another property to finance the whole or part of the purchase price then he or she will need to either have entered an unconditional contract of sale in relation to that other property or to have satisfied himself or herself by enquiry of several estate agents that the relevant property can be sold relatively quickly for a sum safely in excess of the price required to fund the purchase. It is important of course for the purchaser to realise that in the event of failure to complete the purchase contract on time he or she will be liable to pay penalty interest to the date of completion or in the event of not being able to complete within fourteen (14) days of the stipulated settlement date, forfeiture of the deposit and to the likelihood of a claim for damages by the vendor.

Until recent years the vendor of real estate was not obliged to supply information to the purchaser prior to contract. The Sale of Land Act now requires the Vendor to supply certain statutory information prior to the purchaser executing a Contract to purchase. The information required is set out in Section 32 of the Sale of Land Act. The Section 32 Statement should be examined thoroughly by the prospective purchaser and his or her Solicitor before any Contract is executed. The purchaser may be entitled to rescind the Contract if it becomes apparent before he or she accepts title and becomes entitled to possession or receipt of rents and profits that the vendor has supplied false information or failed to supply all the required information.

Whilst the Vendor Statement is required to disclose details of building permits granted within the previous seven (7) years there is no obligation on the vendor to disclose:

- a) permits obtained more than seven years prior to the preparation of the Vendor Statement
- b) works performed without necessary building permits.

As the existence of building works (e.g. renovations or extensions) without permit will most probably not entitle a purchaser to rescind the Contract it is of great importance that effort be made to identify any such works and confirm that the permits have been obtained prior to the purchaser entering into a Contract.

Restrictive covenants or easements, both of which are required to be described in the Vendor Statement can restrict the use of the land and their effect ought to be known and fully understood before a Contract is executed by a purchaser.

Measurements of the property and its precise location should be checked as discrepancies between title and description and physical description will generally give rise only to right of compensation and then only if notified within the time limited by the Sale of Land Act.

Although the Vendor Statement is required to disclose details of zoning of the land, a full understanding of the uses permitted under that zoning should be acquired by the purchaser prior to commitment.

The prospective purchaser should also be aware if the Vendor's title is a General Law Title as against a Transfer of Land Act Title then the transaction of a purchase or sale is more complex and likely to be more expensive and the marketability of the land may be detrimentally affected.

## **POST CONTRACT ENQUIRIES AND PROCEDURES**

Once a Contract has been executed then the purchaser should immediately effect insurance on the property and arrange for the preparation and the registration of a Caveat which will prevent the registration of any future dealings (such as a subsequent mortgage) without the knowledge of the purchaser and any interest created by the subsequently lodged instruments would then rank behind that of the purchaser.

After the purchaser has executed a Contract numerous enquiries need to be undertaken to ensure that:

1. Good title is obtained by the purchaser.
2. Outgoings in relation to property are properly adjusted so that the purchaser undertakes liability therefore only from the date of settlement.

Much of the information obtained from these enquiries will duplicate information supplied in the Vendor Statement. It is however prudent to undertake them as otherwise it is unlikely that any omission or misdescription in the Vendor Statement will be discovered until it is too late to be of assistance to the purchaser.

A title search should be undertaken and followed by applications for certificates from at least the Ministry of Planning and Environment, or Rate Authorities, The Ministry of Housing, The Melbourne Board of Works (as to encumbrances) the Municipal Council (as to the status of roads), Vicroads and Commissioner of Land Tax. In appropriate circumstances it may be necessary to ascertain whether the property is likely to be affected by other legislation such as Environmental Legislation, the Historic Buildings Act or other specific legislation targeted at particular types of property.

It is necessary to deliver requisitions upon the Vendor's title within the time stipulated in the Contract (normally twenty-one days) and to carefully peruse the answers which may disclose defects in title not previously known to the purchaser and which may entitle a purchaser to rescind.

Arrangements need to be made with the purchaser's lender to satisfy its requirements and ensure that funds are available for settlement. Documentation which needs to be lodged with the vendor's title to effect transfer into the name of the purchaser will then need to be prepared in anticipation of settlement.

If the vendor's title is a general law title and a detailed examination of the chain of documents forming part of the title need to be undertaken to ensure that it is adequate and constitutes good title.

Prior to settlement a calculation of the parties' respective proportions of various outgoings needs to be made and a final settlement statement prepared. Settlement will be attended by the parties or their respective Solicitors and the duty of the purchaser Solicitor is to ascertain that at settlement there are handed over by the vendor all documents necessary to enable the registration of an unencumbered title in favour of the purchaser.

After settlement rating authorities need to be notified of change of ownership.

Shortly prior to settlement the vendor and the purchaser may need to jointly arrange for transfer of various services such as telephone, electricity, gas from the vendors name into that of the purchaser as a settlement date.

It will be seen from the above that steps involved in the purchase of property are many. Failure to satisfactorily complete any of the tasks or failure to appreciate remedies available to a purchaser in certain situations can certainly lead to disastrous results for a purchaser and accordingly, unless one is extremely well versed in conveyancing practice and law, the investment of the modest sum required to obtain proper advice and management of a purchase is well worthwhile to protect the much larger investment constituted by the purchase price of the real estate.