



# Précis Paper

## Conveyancing: Past, Present, and Future

*A discussion of the law relating to conveyancing, and its pros and cons*

### **Discussion Includes**

- Problems that may occur when advising a client on a sale of property
- Problems that may occur when advising a client on a purchase of property
- What can occur if there is a change of a condition of the land from the date that the contract was signed
- Disputes arising over conveyances, and how they are resolved
- Risks of buying off the plan, and how practitioners can protect their clients' legal rights
- E-conveyancing
- What the future looks like for conveyancing, and whether there is need for reform

## Précis Paper

### Conveyancing: Past, Present, and Future

1. In this edition of BenchTV, Alex Sapounas (Conveyancer, CM Lawyers, Sydney) and Christine Manolakos (Conveyancer, CM Lawyers, Sydney) discuss the law relating to conveyancing, its pros and cons, and what its future might look like.

#### What problems may occur when advising a client on a sale of property?

2. When advising a client wishing to sell their property, there are many problems that may occur.
3. Ideally, a trained professional (solicitor or conveyancer) with years of training and experience in handling transactions of conveyancing should be acting for a party who wishes to sell their property.
4. A practitioner must look at each individual's circumstances, including:
  - When they are selling
  - Why they are selling
  - If they are looking to buy another property
  - If their finances are in order
5. Initially the preparation of a contract of sale should not be too difficult, given that all the relevant information can be obtained from the client, the property is put on the market, and the agent is marketing it.
6. The major issues that occur in relation to sale of property typically arise over failure by a party to settle (usually caused by delays by a purchaser in obtaining finance, or by delays by a bank in preparing finance for settlement). There are many options open to the vendor in regard to delays in settlement, including, giving the purchaser more time to meet the settlement deadline without penalty.
7. If the vendor is concerned that the purchaser may default on their settlement, or not honour the time bargain, the vendor may issue a notice to complete 24 hours after the settlement has taken place. Normally the notice to complete period lasts for 14 days. There must be a proper notice period, which is normally 1-2 days, depending on the type of service that has taken place. If the buyer does not complete the purchase within the 14 day notice to complete, the vendor has a couple of options, including:
  - Terminating the contract for breach of an essential clause of the contract (which is time)

- Negotiating and issuing the purchaser with more time to complete the settlement (the notice to complete would have to be reissued, thus invalidating the original one)
8. Paying the deposit at the time of exchange is a very important term of the contract of sale. If the buyer does not pay the deposit at the time of exchange, then it leaves it open for the vendor to terminate the sale. Most vendors will not go to this extreme, because they are looking to be commercial, not litigious (especially against a purchaser who has simply made a mistake). After all, conveyancing is about parties getting together to transact the sale of a property, not parties taking advantage of each other.

What problems may occur when advising a client on a purchase of property?

9. The client needs to be ready to purchase a property - this necessarily involves a team of professionals. The client needs to ensure that it has the ability to service the property purchase, for which pre-approval must be obtained.
10. Confusion very often arises over the difference between pre-approval and formal approval. If a purchaser proceeds on a pre-approval, and purchases a property at auction (which is unconditional), it runs the risk of the valuation of its loan turning out lower than the actual purchase price, and then it finds itself scrabbling to source alternative finance.
11. Because of property markets like Sydney 's, which are very heated, people are unfortunately becoming battle-scarred at auction, and the costs of obtaining building, pest and strata reports are extra strain on the purchaser who has been for a long period of time unsuccessfully looking for property to buy.
12. There is a very real danger that the purchaser's appreciation of how important these pre-quality reports really are becomes increasingly diminished as each unsuccessful auction goes by. It is vital that the purchaser understands the importance of these pre-quality reports before it buys the property, because once the property is bought, the purchaser is stuck with it, defects and all.

What can occur if there is a change of a condition of the land from the date that the contract was signed?

13. Under the *Conveyancing Act 1919* (NSW) and its *Regulations*, there are implied warranties as to what the vendor promises the land to be.
14. There are now famous cases in relation to the zoning of a property changing in the time between the issuing of a contract, and the issuing of a re-zoning by a Council.

15. If there is a non-disclosure in the contract, then the purchaser has the right to rescind or seek damages.
16. Section 149 planning certificates should be reflective of the current planning rules that relate to a property.

When a dispute arises over a conveyance, how is it resolved?

17. The contract of sale in NSW provides for a purchaser to be able to make a claim against a vendor (up to 5% of the purchase price under clause 7 of the *Contract for the Sale of Land 2005 Edition*).
18. A practitioner needs to highlight to their client that if clause 7 is deleted, and the client discovers an issue with the property whereby it could make a claim, the deletion of that clause can negate their ability to claim.
19. Clause 7 refers to the ability of someone to make a claim in relation to a material misdescription of a property. Often these misdescription issues do not stop the buyer from wanting to purchase the property, but the buyer would still like to claim an adjustment to the purchase price to reflect those issues. Clause 7 allows a buyer to do this, as long as it is left untouched.
20. Practitioners these days seem to make a lot of amendments to contracts for the sale of land, and clause 7 seems to be continuously deleted, or watered down.

What are the risks of buying off the plan, and how can practitioners protect their clients' legal rights?

21. Nowadays, a vendor's legal representative will provide their own contract of sale specifically dealing with off the plan sales. It is important to remember that because the contract will have been drawn up by the legal representative of the vendor, it will likely be done so in favour of the vendor.
22. Buying off the plan is essentially buying a promise. The vendor's promise is to build a property by a certain time, of certain shape, design, quality, and with certain fixtures. The buyer's promise is to make payment at settlement. So the buyer and the vendor are entering into a promise into the future.

23. Buyers need to be aware that they run financial risk throughout the whole transaction. If they have no ability to raise funds by the time of settlement, they run huge risk of default. The default could lead to them losing their initial deposit, and even being liable for damages.
24. The buyer also needs to be aware of builder risk. Before a buyer enters into a contract for an off the plan, they need to perform their own substantial pre-investigation of the developer and builder.

#### What is e-conveyancing?

25. Conveyancing is probably the largest market in the world, using probably the most archaic systems currently available.
26. People are increasingly getting on board with e-conveyancing. Indeed, e-conveyancing will become compulsory by 2019.
27. The assistance provided by PEXA to new participants being brought on board is extremely valuable.
28. The actual exchange process is still a manual one.
29. Its biggest impact has been on the settlement process of conveyancing, whereby all participants (buyers, sellers, banks) are set up on one online platform, which is linked to The Leading Property Managers of Australia (LPMA). Essentially it creates a verification process for all transactions from beginning to end, and an instantaneous settlement. Parties are able to see at what stage each other party is in the transaction, so the process is transparent.
30. Another benefit is that vendors receive instantaneous funds as soon as settlement takes place, and risks arising in relation to title are minimised because title is also almost instantaneously transferred to the purchaser's name upon settlement.

#### What does the future look like for conveyancing, and is there a need for reform?

31. The internet is increasingly having an impact on our ability to move information electronically, like in all areas of industry.
32. The manual process of exchanging contracts will at some point become obsolete, and people will increasingly see the attraction of signing a digital contract.

33. Workflow will become electronic, and paperwork, reduced, which is favourable to improving the efficiency and profitability of the work of lawyers and conveyancers. However, it does also throw up some challenges, particularly with respect to the delineation of costs and benefits as between the consumer and the practitioner.
34. The role of the conveyancer and lawyer will not change in respect of their function as trusted advisors.
35. Currently, the property market lacks the transparency and availability of information that its contemporary markets have (for example, stock exchanges), especially as the world's largest investment market.
36. In an ideal world, a perfect conveyance would involve a practitioner being able to receive a contract from a vendor providing guarantee for all implicit promises built into that contract. For example, promises of no encroachment in the contract would be compulsorily accompanied by surveys to that effect; or promises of no illegal works to the property would be accompanied by building certificates.
37. Purchasers should be able to be confident that the condition of a property is actually reflected in its marketing, and the way in which it is presented to his or herself as a prospective buyer (which includes disclosure of all defects). For example, building, pest and strata reports should be included in the contract.
38. Conflicts of interest that arise in relation to the ordering of such reports, and by whom, will be tricky navigate at first by stakeholders in the industry.
39. The Department of Fair Trading could hold a register for all professionals involved in the conveyancing and inspection industries, which would allow for a randomly selected, qualified professional to perform the inspections for a vendor without risk of bias, or of causing a conflict of interest.
40. The increased cost of selling a property in this way will be far outweighed by the sum of the cost and trouble of all the additional disclosure processes that would otherwise be covered by a contract such as the one suggested.

## **BIOGRAPHY**

### Alex Sapounas

Conveyancer, CM Lawyers, Sydney

Alex is an award-winning conveyancer and trusted professional who had been practicing for over ten years prior to joining CM Lawyers in 2003. He has extensive experience in a number of large financial institutions such as Coopers & Lybrand and Perpetual Trustees, working as the Commercial Manager at both in their Securities Department.

### Christine Manolakos

Solicitor, CM Lawyers, Sydney

As Principal Solicitor of CM Lawyers, Christine brings over 20 years of experience and a wealth of knowledge to the areas of conveyancing, family law, wills & estates, and criminal Law. Establishing her own practice in 1996, Christine and Alex have been working together to provide the Marrickville community with practical, current and relevant legal advice.

## **BIBLIOGRAPHY**

### Legislation

*Conveyancing Act 1919 (NSW)*

*Contract for the Sale of Land 2005 Edition*