



Importance of legal representation

By Nicole Tan

THERE are many pitfalls that await unsuspecting purchasers in sale and purchase transactions. One of the most serious ones is the issue of legal representation. Who does the solicitor represent in a sale and purchase or loan transaction? Before we explore the different scenarios, just remember that the cardinal rules of conveyancing are "each party to a transaction should engage his own solicitor" and "a solicitor shall not act for more than one party in a particular transaction".

One solicitor and property unencumbered

Very often in a case of purchase of a property, which is unencumbered by the vendor, a solicitor is engaged by the purchaser to act for him, and the vendor chooses not to be represented in the sale transaction. It is common for a vendor to choose not to be represented as he does not wish to pay legal fees. In such cases, it is important for the vendor to know that the solicitor is only representing the purchaser.

If consent from a state authority/statutory body is required before the vendor can sell the property, the vendor may appoint the purchaser's solicitor to apply for such consent. In such a case, the vendor must understand that the purchaser's solicitor may, where there is no conflict of interest and upon payment of the appropriate legal fees by the vendor, act for the vendor to obtain the necessary consent. This will not mean that the solicitor is acting for the vendor in the sale transaction.

The vendor may also engage the purchaser's solicitor to submit the vendor's real property gains tax returns, for which the vendor is liable to pay the appropriate fees that will be charged.

If the vendor is not comfortable with this arrangement and feels that he needs separate legal advice in respect of the sale or the application for consent or the submission of tax returns, the vendor should engage his own solicitor to act for him in these transactions.

One solicitor and property encumbered

In a case whereby the property sold is encumbered by the vendor, for example, charged to a financial institution, and the vendor is not represented in the sale transaction, the vendor may engage the purchaser's solicitors to act for the vendor in the discharge of the property from the financial institution. The vendor will have to bear the legal fees for the discharge. In such a case, it does not mean that the purchaser's solicitor is acting for the vendor in the sale and purchase transaction as he is only acting for the vendor in the discharge transaction.

Two solicitors

Ideally, the vendor and the purchaser should



ABDULL GHANI ISMAIL

Don't try to save on legal fees and end up paying more if your rights and interests are somewhat compromised when purchasing your home

each seek separate legal representation in order to ensure that their respective rights and interests are fully protected. The vendor's solicitor shall act for the vendor in the sale transaction, the discharge transaction (if any), the application for consent (if required), and the submission of the vendor's real property gains tax returns.

The purchaser's solicitor shall then act for the purchaser in the purchase transaction and in the submission of the purchaser's real property gains tax returns.

If a purchaser requires a loan, the purchaser's solicitor may act for the purchaser's financier in the loan transaction.

Three solicitors

If the purchaser's financier does not appoint the purchaser's solicitors to act for the financier in the loan transaction, then three solicitors may be involved in the transactions, that is, one for the vendor, one for the purchaser and one for the purchaser's financier.

Estate agents and developers

A purchaser may be pressurised by an estate agent to appoint a firm of solicitors recommended by the agent. A purchaser should not succumb to such pressure. As the purchaser will be responsible for paying the legal fees, he should have the sole right to determine who should act for him.

Purchasers of property should beware of developers' gimmicks like "free legal fees" or "subsidised legal fees". In some cases, the developer's panel solicitor may be representing the developer and not the purchaser and that is why the purchaser does not have to pay any legal fees. In other cases, the developer's panel solicitor may be acting for the purchaser and his fees are paid by the developer.

Every purchaser has a right not to use a solicitor on the developer's panel. Of course, this may mean that the purchaser may not be entitled to the "free legal fees" or "subsidised legal fees".

The financial institution

Generally, all financial institutions in Malaysia offer a loan to the borrower on condition that

the borrower pays the legal fees of the solicitor appointed by the financial institution to complete the security documentation. In such cases, the borrower must bear in mind that the solicitor appointed by the financial institution is acting for the financial institution and not for the borrower, even though the borrower is paying the legal fees.

A borrower is entitled to seek independent legal representation for the loan transaction but this will mean that the borrower may have to pay two sets of legal fees, one for the financial institution's solicitor and one for his own solicitor. Hence in most cases borrowers choose not to be represented in the loan transaction.

Many legal practitioners are of the view that financial institutions should pay their own legal fees on a widely accepted principle that the costs of legal services should be paid by the recipient of those services. The current trend of zero-moving cost loan packages offered by financial institutions, where legal fees are borne by the financial institutions, is a correct move towards that direction.

Conclusion

To sum up, every party to a transaction needs independent and separate legal representation in order that his rights and interests are fully protected.

If you think that you cannot afford the services of your own solicitor, then you should consider whether you can afford not to. The moral of the story is "don't be penny wise pound foolish". Don't try to save on legal fees and end up paying more if your rights and interests are somewhat compromised.

The writer is a member of the Conveyancing Practice Committee, Bar Council, Malaysia www.malaysianbar.org.my

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