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FEATURE ARTICLE

Conducting Real Estate Due Diligence

Part II

Lawyers play a critical role in conducting due diligence, which includes authenticating facts provided by the seller or the seller's solicitor to ensure that his or her client gets exactly what they thought they were buying.

The solicitor representing the buyer has more potential risks. It is therefore expected that the buyer's lawyer has verified key information in the Sales and Purchase Agreement before it is presented to the purchaser. Carrying out relevant searches is crucial to alert the purchaser if there are potential problems to the current zoning by municipal council or to the title of the property or on any issues related to that property.

But what happens when the buyer's solicitor overlook a fact – obviously, the whole transaction could turn into a 'missed opportunity' for the client.

A foreign investor, Nilesh Prasad, invested \$385,000 in a property in the Western division with the intention to develop a motel. He had hired a reputable law firm in Fiji to assist in conveyance.

Unfortunately, Nilesh could not go ahead with his investment plan because the property was zoned as 'Residential B' and not as 'Commercial B' as stated on the Sales and Purchase Agreement.

Much of Council's investigation into the case focused on the due diligence. The Council tried to comprehend as to how the law firm hired by Nilesh as well as the seller, failed to check the zoning of the property with Nadi Town Council, which is significant when planning a commercial development.

The law firm hired by Nilesh informed him via an email that the property he intends to purchase was freehold but zoned 'Commercial B' which allowed for the construction of motels/boarding houses. However, it will not allow establishment of any shopper retail outlet which falls under 'Commercial A' zoning.

The Council wrote to this law firm raising the following concern: As part of the conveyance process, did your firm conduct any search or seek any clarification from the municipal council or the Director of the Town and Country Planning to verify the actual zoning of the property before Nilesh signed the Sales and Purchase Agreement and/or before the settlement date? The firm was also asked if they had viewed the building plan, completion certificate and permit to occupy the property?

The buyer's law firm responded saying: "Our instructions did not extend to making enquiries on the zoning of the property". They further stated that the valuation report and the clause in the

Sales and Purchase Agreement stating that the property was zoned 'Commercial B' was sufficient for the parties to rely upon.

"There was no reason to doubt this considering that both the valuation company and the seller's solicitor are professionals and their representations are expected to be correct and relied upon." Nilesh's lawyers replied.

The Council also wrote to the seller's solicitor highlighting the issue and questioned them about their knowledge on the zoning of the property in question.

We asked: "If there was any documentation describing the actual zoning of the property you used to prepare the sales and purchase agreement? And, as part of due diligence, did the firm conduct any search or seek any clarification from the municipal council or the Director of Town and Country Planning to verify the zoning of the property before the Sales and Purchase Agreement was finalised?"

The seller's solicitor responded by saying that they only acted for the seller and that the Council should refer all queries to the law firm hired by the purchaser in this case, Nilesh.

Both law firms were passing the buck not owning up that the Sales and Purchase Agreement was signed without proper due diligence. Both lawyers failed to conduct an independent search about the property.

We understand the seller's solicitor drafts the Sales and Purchase Agreement and the buyer's solicitor conducts "due diligence" prior to the execution of the Agreement and before taking deposit.

In this regard the Consumer Council has filed a complaint with the Chief Registrar of the High Court against the two law firms as per section 129 (8) of the Legal Practitioners Decree 2009.

The Council is of the opinion that lawyers of both the parties should have been privy to the correct zoning of the property prior to the execution of the agreement. However, the buyer's solicitor acted negligently and breached his duty of care to its client.

At the end of the day, despite hiring a solicitor, Nilesh was not given the best protection against buying a property which was not what Nilesh wanted. So what is the value of the advice given by the buyer's solicitor?