PRACTICAL AND LEGAL QUESTIONS RELATING TO THE DRAFTING OF AGREEMENTS FOR THE SALE OF LAND

This paper is not intended to be exhaustive but merely to alert parties and practitioners to a few of the more commonly encountered situations regarding Agreements for sale of Land.

The importance of Agreements for Sale of Land may be considered to be grounded in the **Statute of Frauds of 1677** of which Section 4 provided

> " **No action shall be brought..... upon any contract or sale of lands tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."**

The raison d'etre of the Statute was to eliminate unscrupulous litigants who sought to pursue false or groundless claims with the help of manufactured evidence since until the passage of the **Evidence Act** 1851 there was a ludicrous rule of the common law which forbade a person to testify in any proceedings in which he was interested and the parties to a contract might have to suffer in silence the ignorant or wanton misconstruction of facts which they alone could have set in a proper light.

Although much of the statute has been abolished in England where it was first enacted Section 4 was re-enacted by Section 40 of **Law of Property Act** 1925 in England. Although the latter statute is not applicable to Jamaica Section 4 of the original statute, which we received was never repealed in Jamaica.

A contract for the sale of land is valid if oral but if not evidenced in writing or partly performed cannot be enforced.

Thus in order to satisfy the **Statute of Frauds** the following basic requirements for a contract for the sale of land must be observed and if in existence though quite inadvertently may form the basis for an enforceable contract.

(1) A note or memorandum providing it contains

(a) The names or adequate identification of the parties - **Potter v. Duffield 1874 LR 18 Eq. 4 and Rossiter v. Miller 1878 3 Appeal Cases 1124 per Lord Cairns al pp. 1140-1**

(b) Description of the subject matter - **Coddick vs Skidmore (1857) 2 De G & J. 52 and Plant vs Bourne, [1897] 2 Ch. 281**

(c) The nature of the consideration

(d) The signature of the party to be charged

The circumstances of each case need to be examined to discover if any individual and term has been deemed material by the parties and if so it must be included in the memorandum.

The document need not have been prepared as a contract, agreement or memorandum and thus parties intending to be exploratory in their negotiations or intending to set the framework for instructions to be given to an Attorney for the preparation of a contract have to be particularly careful in their correspondence and the use of the words " subject to contract" should accompany all written communication which could be construed as offers in writing or acceptances.

The courts have accepted as sufficient a telegram, a recital in a will, a letter written to a third party - **Godwin vs Francis (1870) LR s C.P. 295 Re Hoyle, Hoyle vs Hoyle 1893 1 Ch 84 Gibson vs Holland (1865) LR 1 C.P. 1** a written offer - **Parker vs Clark 1960 - 1 All ER 93; 1 WLR 286** and even a letter written by the defendant with the object of repudiating his liabilities **Buxton vs Rust (1872) LR 7 Exch 279.**

All that is required is that the "memorandum" should come into existence before the commencement of the action to enforce the contract. Thus in the leading case of **Farr Smith & Co. vs Messrs Limited 1928 1 K.B. 397** an action was started against the defendants in the name of certain plaintiffs and a statement of defence was filed which set out the terms of the agreement in question.

Leave was then given to amend the writ and statement of claim by striking out the original plaintiffs and substituting the

plaintiff company. It was held that this new step was in effect the commencement of a new action and that the original statement of defence signed by counsel as the defendant's agent could therefore be regarded as a sufficient memorandum to satisfy the statute.

With regard to the signature on the memorandum only the person whom it is sought to hold liable on the agreement or his agent need sign. A plaintiff who has not signed can sue a defendant who has.

The word signature has been loosely interpreted; **Leeman vs Stocks 1951 1 ALL ER 1043.** As stated in **Cheshire & Fifoot's Law of Contract;**

> **"The defendant instructed an auctioneer to offer his house for sale**
> **Before the sale the auctioneer partially filled in a printed form of Agreement for Sale by inserting the defendant's name as vendor and the date fixed for completion. The plaintiff was the highest bidder and after the sale the auctioneer inserted in the form of the plaintiff's name as purchaser, the price and a description of the premises. The plaintiff signed the form. The defendant then refused to carry out the contract and the plaintiff sued for specific performance. The defendant pleaded failure to satisfy S.40 (1) of the Law of Property Act and in particular that he never signed any document.**
> **It was held that there was a sufficient memorandum to satisfy the statute and that the defendant was liable. His agent acting with his authority had inserted his name as vendor into the printed form and this form was clearly designed to constitute the final written record of the contract made between the parties.**

A number of documents may be joined to provide one contract. The conditions for this are

(1) the existence of a document signed by the defendant
(2) a sufficient reference, express or implied in that document to a second document
(3) a sufficiently complete memorandum formed by the two or more when read together

The present state of the law remains as set out in the case of **Timmins v Moreland Street Property Limited 1958 Ch. 110; 1957 3 All ER 265** and was endorsed in the Privy Council decision on a case originating from Barbados, **Elias vs George Sahely & Co. (Barbados) Ltd. 1982 3 All ER 801** which also endorsed the principle that

parole evidence may be given to identify the connecting documents. This principle has been applied in our jurisdiction in the Court of Appeal decision; **Austin McKenzie vs Ada Barrett, Supreme Court Civil Appeal No. 44/92.**

It is important to note that a contract which fails to satisfy the statutory requirements, while it may not be sued upon at common law may yet be used in certain circumstances as a defence. **Thomas vs Brown (1876) 1 Q.B.D. 714 at P.723.**

The parties made an oral contract for the sale of land under which the purchaser paid a deposit to the vendor. The purchaser then decided not to go on with the transaction and brought an action to recover the deposit. The action failed. The seller while he could not have sued on the contract could use it to justify the retention of the deposit.

Having established the basis for the necessity for a written Agreement for Sale of Land one must now consider what one has to do to formulate such a contract and some of the terms which should be included to give the contract a higher degree of efficacy for the parties.

It is during the pre-contractual stage that the die may be cast for future problems during the transaction as it is often during this stage that lay persons in attempting to put together a deal may set conditions which are sometimes tainted by illegality, statutory prohibitions, or other considerations which create problems.

PRICING

One of the most frequent problems which arises in the preliminary or pre-contractual stage concerns the pricing of the property being sold.

Quite often in an attempt to reduce the incidence of Transfer Tax and Stamp Duty payable on a contract for the sale of land the parties attempt to set two prices; one price which is only known to the contracting parties which is the higher price and another lower price which is told to Real Estate Agents, Attorneys and the world at large. If later on the price which is placed in the contract is the only price which is actually paid there is trouble! Depending on the nature of the parties this can result in problems ranging from a minor dispute to life threatening situations. Such attempts to evade the payment of Transfer Tax and stamp duties are criminal

offences prosecutable under law with possible terms of imprisonment as they are classified as attempts to defraud the Government of its revenue.

As such attempts often result in the contracts being affected with illegality it can also lead to the inability of the parties to settle the issue in a Court of Law hence the reason for threats, violence and other illegal means to resolve the dispute.

Clients must be warned by legal practitioners and real estate agents alike against the practice as the implications are serious and often taint the reputation of practitioners and real estate agents. Practitioners who knowingly participate in such transactions are as liable as their clients. See **Saunders et al v Edwards et al (1987) 2 All ER 691 (CA.).**

There are legitimate methods in some cases of avoiding the full incidence of transfer tax and stamp duty which are outside the scope of Agreements for the Sale of land although impacting on land itself and may be pursued in a paper dealing with company acquisitions and mergers but as our mandate is here to deal with Agreements for the Sale of Land we will confine our paper to such.

One particularly simple way of ensuring that the parties to an Agreement for Sale of Land do not pay more tax and or duty than is required may be illustrated thus.

Wherever apartments or buildings containing furnishings are being sold one may quite legitimately price the chattels separately from the real estate and pay transfer tax and stamp duty only on the price of the real estate while the price of the chattels attracts a nominal duty of $20.00.

A word of warning however; any attempt to overprice the chattels by loading it with what is actually real estate value can have two disastrous results

(1) The Stamp Commissioner always has the power to assess the market value of the real estate and charge stamp duty and Transfer Tax on that value. She may therefore decline to accept the value declared and delay the transaction until her valuers can visit the site or alternately a valuation from a reputable valuator is produced. Some practitioners attempt to cure this possibility by placing a special condition in the agreement which gives either or both of the parties a right to cancel the agreement if the Stamp Commissioner assesses the stamp duty and transfer tax on a higher consideration than stated.

(2) If there is any diminution of the quantity or quality of the chattels between the time of execution of the Agreement and completion a Purchaser may insist on and obtain an abatement in the price of the articles missing on completion based on the inflated sum apportioned to the article or articles resulting in a reduction in the price beyond that which the vendor would have actually ascribed to the article.

Another manner in which substantial savings can be realized in the preparation of Agreements for Sale by the reduction of the incidence of Transfer Tax and in some cases stamp duty is in the case where a development is taking place and a contract may be prepared for the purchase of the land and a separate contract entered into for the construction of a house.

It should be noted that this devise is only foolproof against the full taxation for stamp duty on the value of the land and the house, where the contract for the sale of land is executed and stamped before construction of the house commences.

Even where construction of the house has been completed some relief may be obtained on the payment of Transfer Tax in the case of a newly constructed dwelling which has been constructed as one of two or more in an approved sub-division by a developer pursuant to the relief given under the Transfer Tax Act.

The relief given is that of an assessment of Transfer Tax only on the notional value of the land attributed to twenty-five per cent of the full value of the house and land. Stamp Duty however is payable on the full value of the house and land.

The Stamp Commissioner however will require proof of existence of the sub-division and the registration or licencing of the developer by the Real Estate Board.

It is advisable when drafting a contract dealing with this particular situation in order to avoid misunderstanding to not only state the full price in the contract but to give a breakdown of the 25% / 75% ratio between land and newly constructed dwelling in the document.

RISK

It should also be noted that the law applicable to the sale of Land differs in many respects to the law applicable to the Sale of Goods and one very important variation is that in relation to the passing of "risk".

Land and hence a building or structure thereon is at the risk of the purchaser immediately upon signing. In the case of **Amalgamated Investment and Property Co. Ltd. vs John Walker & Sons Ltd [1976] 3 All ER 509 1977 WLR 164,** the vendor obtained specific performance of a contract to sell a building at a price of £1,700,000.00 although after contract the building was listed as of special historic interest and was then worth only £200,000.00.

In **Robertson vs Skelton 1849 12 Beav. 260.** An accident to the premises brought a legal obligation which had to be satisfied immediately eg. when the premises fell down and injured adjoining property the expense must be borne by the purchaser.

In the Sale of Goods the risk on the chattels only passes after the purchaser has taken possession.

The incidence of fire, hurricane, earthquake and other Acts of God can have devastating consequences on the completion of a transaction. It is therefore important to alert parties to the legal position with regard to the incidence of risk and this can be done quite simply by stating in the contract who should bear the risk before the contract is completed.

TERMS OF PAYMENT

Arising directly out of the pricing of the property is the terms of payment.

The case of **Workers Trust & Merchant Bank Limited vs Dojap Investments Limited 1993 2 WLR 702** which was decided by the Judicial Committee of the Privy Council on appeal from the Court of Appeal of Jamaica has had a direct impact on the structuring of payments.

Our colleague Mr. Roald Henriques Q.C. produced a rather erudite paper analysing the case which I will not attempt to repeat here but the main areas of applicability must be noted.

The case in essence addresses the issue of the payment of a deposit in Agreements for Sale of Land and in effect has strongly recommended that a deposit should be no larger than ten per cent of the contract price unless the vendor can show special circumstances to justify a larger amount.

It should also be noted that where a deposit larger than ten per cent is collected an applicant for relief against forfeiture is likely to obtain full relief of the entire amount collected as a

deposit and not just lose ten per cent of the purchase price and be refunded the excess as our Court of Appeal attempted to do.

The necessity to pay Transfer Tax and Stamp Duty which amounted to more than ten per cent of the purchase price within thirty days of the execution of the contract was not regarded as special circumstances as Lord Browne-Wilkinson in delivering the judgement stated:

> **"As for the tax element the Board do not suggest that it would be unreasonable for a vendor to require advance payment of an amount sufficient to discharge the liability for transfer tax on or before completion"**

A number of practitioners have thus amended their standard form of contract to provide for a deposit of no more than ten per cent of the purchase price and a further payment of five per cent plus wherever possible a request that the purchaser advance the Transfer Tax and Stamp Duty so as to avoid the vendor having to go into his pocket to find the funds required to clear the liability. In fact section 18 of the **Transfer Tax Act** provided for the purchaser to pay the tax and recover it from the vendor by deduction from the purchase price or by action. This also explains that it is imperative that we advise our clients that they should not enter into arrangements agreeing to the purchaser bearing the incidence of transfer tax as the purchaser is entitled to recover it from the vendor by suit action even after the contract is completed.

OPTION

One practical method of putting together an Agreement for Sale while enabling a prospective purchaser who is not immediately able to find the deposit and further payment of the full ten and five per cent of the purchase price is to use the method of preparing an option to purchase the property intended to be sold.

An option may be given by a vendor of property to a purchaser to enter into an agreement by a specific date to purchase land on certain terms and conditions which must be set out in the form of a draft Agreement appended to the option document as a schedule.

The option money payable may be nominal or a figure sufficient to cover the costs incurred by the vendor to prepare the document. Stamp Duty and Transfer Tax is then payable on the option money which being nominal or greatly reduced results in a smaller expenditure for the payment of Stamp Duty and Transfer Tax.

The purchaser may then organise herself or himself to obtain sufficient funds to pay the deposit and further payment by the date specified in the option and upon so doing may exercise the option by notice in writing and payment of the deposit and further payment. It is customary to give the purchaser credit for the option money paid by crediting the amount against the purchase price accordingly. If the purchaser does not exercise the option however the option money is usually kept by the vendor.

A signed Agreement pursuant to the draft set out in the Schedule should then be sent to the Stamp Commissioner for payment of stamp duty and transfer tax on the full purchase price.

It is important to note that the Agreement for Sale which is in the schedule to the option should not be signed when the option is given but may be initialled only to ensure that the Stamp Commissioner does not assess the full agreement but only the option which is then in force.

INTEREST ON PURCHASE MONEY

The question of the payment of interest on purchase money arising out of an Agreement for Sale of Land particularly where the Agreement is silent is one that has achieved particular significance in Jamaica having regard to the comparatively high rates of interest prevailing in our economy.

It is well established and understood that a vendor is entitled to interest on the balance of purchase money from the date when the purchaser takes possession if the purchaser has not yet paid over the full purchase price. If therefore it is intended that a purchaser be given possession before payment of the balance of purchase money and the purchaser does not wish to be liable to pay interest arising out of some special arrangement then the contract should specifically state that even though the purchaser is being put in possession, no interest shall be payable on the balance of purchase money.

It is however not always understood that this is so even if the failure to pay the balance of purchase money to the vendor arises out of the default of the vendor in providing title to the property. This principle was re-stated in the case of **Noel Courtney Sale vs Sonia Allen** Privy Council Appeal No. 15 of 1986 from the Court of Appeal of Jamaica which was argued by Dr. Lloyd Barnett instructed by Messrs. Perkins, Grant, Stewart, Phillips & Co. arguing for the respondent.

In this case Lord Oliver of Aylmerton in delivering his judgement stated

> **"Enough has been said to demonstrate that responsibility for delay in completing the contract lay fairly and squarely at the door of the appellant (ie the vendor) and his advisers and it is not therefore in the least surprising that Campbell J. dismissed the appellant's action, decreed that the agreement be specifically performed and ordered that the respondent should have the costs of her claim and counterclaim such costs when taxed and agreed to be deducted from the balance of the purchase money .....**
> **The only respect in which the decision of the Court of Appeal is in their Lordships' opinion open to criticism is their rejection of the appellant's claim to interest on the unpaid balance of the purchase money. The evidence established and indeed it is not in dispute that the respondent has been in possession of the property as purchaser under the sale agreement since July, 1976. It is true that in March, 1979 she agreed to pay a nominal rent of $10.00 per month seemingly because of an apprehension on the part of the appellant that she might otherwise be able to establish a possessory title. Their Lordships are unable however to find in this arrangement anything which would displace the ordinary rule that even where delay in completion is due to the default of the vendor a purchaser in possession and in receipt of the rents and profits of the property sold is liable on completion to pay interest on the unpaid balance of the purchase money from the date when he takes possession"**

It should also be noted that this case established that the costs of an action by a purchaser to obtain specific performance can be deducted from the balance of purchase money so a word of warning to vendors who whimsically seek to cancel validly subsisting sales agreements or refuse to complete a sale.

The question of the payment of interest on balance of purchase money usually becomes an issue in the sale of strata lots in a newly constructed apartment as titles cannot be obtained for the strata lots until the construction of the building is complete.

When the construction is completed the vendor then more often than not immediately delivers possession of the apartment to the purchaser who often finds that he is unable to draw down on his pre-arranged mortgage commitment as the mortgagee usually will not disburse until the titles are ready and then the purchaser who is forced to pay interest in the interim period balks at these

payments citing that it is the vendor's fault why he is unable to pay over the balance of purchase money.

This seemingly paradoxical situation should be well explained to purchasers by their legal representatives before they enter into any agreements for the purchase of apartments which are in the process of construction as failure to do so often results in the hurling of abuse by harried purchasers who then feel that there is collusion between the vendor's attorneys and their own attorneys to extract more money than they ought to pay.

This must be contrasted with the question of the payment of interest when the date for completion passes the purchaser is not in possession and completion does not take place.

When a sale agreement fixes a time for completion but is silent as to the payment of interest, interest at the appropriate rate is as a general rule payable as from the date so fixed. See **Calcraft vs Roebuck 1790 1 Ves. 221** . However if the delay in completion is caused by the vendor he is not allowed to profit by his own default.

When there is no express agreement for the payment of interest, the purchaser if he is not responsible for the delay can avoid payment of interest by appropriating money to meet the purchase money and giving notice of the appropriation to the vendor.

The effect of the appropriation is only to stop interest from running; the money should either be placed on deposit or otherwise kept available at the purchaser's bank. Any interest which is actually made by the money belongs to the vendor.

ESTATE AGENTS AND THEIR COMMISSIONS

In Halsbury's Law of England 4th Edition Volume 1 (2) a bold statement may be found **"The making of a contract for the sale of land is no part of an estate agent's business"** This is clearly intended to refer to the question of whether an estate agent can enter into a contract on behalf of his client as Halsbury's goes on to state

> **"Accordingly an estate agent authorised to set in and about a purchase has no implied authority to purchase"**

The learned author further states that where a pre-contract deposit is paid by the purchaser to the estate agent the latter is not by virtue of the engagement by the vendor, constituted an agent of the vendor for receipt of this deposit and the vendor is under no liability to the purchaser to repay it in the event of default by the estate agent **Sorell vs Finch (1977) AC 728 (1976) 2 All ER 371 H.L.** which overruled **Golding vs Frazer (1966) 3 All ER 234**

A source of great concern among real estate agents is the matter of the commission and payment.

A contract between an owner of property and an estate agent to sell the property is in fact a promise by the property owner to pay a sum of money upon the sale of the property through the instrumentality of the agent **Luxor (Eastbourne) Ltd vs Cooper (1941) AC 108.** The agent is under no obligation to do anything and consequently no term can be implied in such a contract that the property owner will not act in a manner so as to prevent the agent from earning his commission.

Where an agent is appointed as a sole agent, however, the agent is under an implied obligation to use his best endeavours to sell the property and this is sufficient consideration to support the contract and the agent would be in breach of his contract if he did not do something although he might not be successful **E. Christopher & Co. vs Essig 1948 W.N. 461.** Incidentally an appointment as sole or exclusive agent does not preclude the owner from selling the premises himself unless the contract expressly so provides. See **Luxor (Eastbourne) Ltd vs Cooper, supra.**

The event triggering the payment of the commission depends upon the construction of the contract. Normally when the event is the finding of a purchaser no claim for commission can arise until the purchase price has been received or would have been received but for the default of the principal.

Commission is payable upon completion of a sale to a purchaser introduced by the agent notwithstanding the fact that the instructions were withdrawn beforehand.

If the vendor enters into a contract with the purchaser and the purchaser is willing and able to complete, a fact which the agent must establish, and the vendor refuses to complete the commission is payable. No commission is payable if the sale is not completed by the default of the purchaser. In the event of the vendor succeeding in an action for specific performance or damages commission will be payable.

Remuneration can only be claimed on transactions which are the direct consequence of the agency.

It should be pointed out that the placement of a specific condition in an Agreement for Sale of land referring to the payment of a commission to an estate agent upon completion of a sale does not by itself constitute a contract between the Agent and the party to be charged or the Attorney acting on behalf of the party to be charged as there is no privity of contract arising from the Agreement for Sale between the agent and the attorney or between the agent and the party to be charged. The clause only amounts to evidence of the contract between the agent and the party to be charged.

It creates no obligation on the Attorney although Attorneys will be well advised in maintaining good relationships with Agents to ensure that payments due to them are made.

Some vendors insist that no mention be made in the contract of the arrangement with the agent and it is not within the agent's authority to insist on the same. It is our view therefore that agents ought to have clients sign agreements for listing properties which should be clear and unequivocal as to terms of the engagement in order to protect themselves.

The above agreement between the agent and his/her client should probably have an irrevocable authority from the client to the client's attorney to pay the agent's commission upon completion of the sale from the net proceeds of sale if any remain after settlement of all charges on the property.

This we submit is the best possible approach as an agent cannot secure his commission by registering a caveat or charge on the property, for his right relates only to money. **Georgiades vs Edward Wolfe & Co. (1965) Ch 487.**

IMPORTANT PRE-CONTRACT INVESTIGATIONS OF TITLE

An Attorney should never permit his client to embark on negotiating and settling terms of the agreement without making certain essential investigations as to the state of the Certificate of Title and the property. We set out below a few of the matters which are sometimes overlooked.

1. RIGHTS OF PRE-EMPTION

Restrictive covenants imposing pre-emption rights are usually found on Certificates of Title issued in respect of certain schemes developed by Government. The Minister of Housing and the National

Housing Corporation constructed a number of housing schemes in which the cost of the land was subsidized, thus resulting in the first purchaser paying less than the true cost for the acquisition of the land and house.

To protect itself and to ensure it could recover the subsidy, the Developer (whether the Minister of Housing or the National Housing Corporation) obtained as one of the terms of the Agreement for Sale a right of first refusal in respect of the sale of the land by the first purchaser.

The right of first refusal was then endorsed on the Certificate of Title as a restrictive covenant.

The Registrar of Titles therefore will not register the transfer and the mortgage without the consent of the original vendor (the Developer).

It is therefore necessary that the practitioner obtain the consent of the original vendor and insert in the Agreement for Sale a clause giving the right to the present vendor to rescind the Agreement for Sale and refund the deposit without interest thereon to the purchaser if such consent is not obtained.

A new practice has developed in which Developers sell land and require the purchaser to build within a certain period in accordance with a specified plan failing which the Developer shall be entitled to re-acquire the land at the original or a particular sale price.

The effect of this clause should be pointed out to your client.

CONSENT BY THE ORIGINAL VENDOR TO ADDITIONS OR EXTENSIONS TO THE DWELLING HOUSE

Again in schemes developed by Government the Minister of Housing, a corporation sole has the right to approve the addition or extension to certain dwelling houses originally sold by it.

Failure to obtain the required approval from the Minister of Housing could result in the mortgage institution providing the loan for the purchaser to complete the purchase, refusing to disburse the mortgage proceeds, until such approval is obtained.

Please note that a competent Commissioned Land Surveyor will make reference to an addition or extension effected to the dwelling house.

In fact, the valuator should mention the addition or extension in his valuation report.

Unfortunately, however, the valuation report is usually done after the sale agreement has been signed.

After inspection of the certificate of title and before the preparation of the agreement for sale, the practitioner should advise the client that if he has done any extension or addition, he should have obtained the approval of the Minister of Housing thereto.

If he has not done this, then he should ensure that it is done preferably before the Agreement for Sale is signed.

PERUSAL OF THE RESTRICTIVE COVENANTS

Most certificates of titles have restrictive covenants endorsed thereon.

The practitioner representing the purchaser should enquire of the intended use of the property.

If the purchaser intends to use the property for commercial purposes and there is a restrictive covenant endorsed on the certificate of title preventing such user, then one should seek to have inserted in the Agreement for Sale a clause requiring the vendor to modify the covenant and specifically state that on his failure to do so, the Agreement for Sale would be cancelled.

If the vendor refuses to do this, then one should seek to have the price reduced subject to the client's consent.

This is particularly important when the vendor is seeking to obtain a "commercial lot" price for residential premises.

The disadvantage to the purchaser is that he may pay the "commercial price" and then encounter difficulties with the Planning authorities and neighbours when he seeks to use the premises commercially.

This is of particular concern as there has been a serious and dangerous encroachment into residential areas by commercial interests and it may be only a matter of time before some effective measures are instituted to counteract the problem.

Clients should therefore be advised of the possible risk of embarking on such a course.

One must appreciate that there is a tremendous loss of revenue to government in that the taxes paid on these residential properties operating as commercial properties are extremely low in relation to the benefits received by the owners of the properties.

ASCERTAIN THE AMOUNT OF LAND IN THE CERTIFICATE OF TITLE

A practitioner who represents a Developer who desires to construct several habitable rooms should advise the client to confirm the amount of land being purchased as his development may be restricted by the size of the land.

An Attorney should also peruse the certificate of title to ascertain whether or not there have been any part of land transfers endorsed thereon.

Additionally one should instruct the client to have a Commissioned Land Surveyor check the boundaries of the land to confirm that there are no encroachments on the land being purchased.

This is particularly important if your client intends to do a strata subdivision as one of the requirements for obtaining a strata plan is that these buildings must be within the boundaries of the land and the size of the development will be determined by the external boundaries.

If possible, negotiate the insertion of a clause dealing with the size of the land and fixing the price paid for the land to the size thereof, and reserving the right, if the land is substantially less than that estimated or represented by the vendor, to cancel the Agreement for sale.

ASCERTAIN THE REGISTERED PROPRIETORS OF THE LAND BEING SOLD

Never proceed solely on your clients instructions as to the state of the Certificate of Title. One should always obtain substantiating documentation.

Specifically, one should examine the certificate of title to ensure that the person who states that he is the owner of the property is in fact the registered proprietor of the said land.

The "owner" may only have an equitable interest in that he has entered into an Agreement for Sale to purchase the land.

Parties to a contract should be properly advised as to the percentage of the purchase price that can be required by a vendor of a purchaser as a deposit having regard to the Dojap case.

Finally, we would close by stating that once instructions have been taken by the attorney, it is incumbent on him to ensure that the parties wishes are fully and comprehensively incorporated into the written documents which will preclude confusion and uncertainty and enable a smooth conclusion of the contract for the sale of the property.

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AND

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TEXTS	**CHESHIRE & FIFOOT LAW OF CONTRACT** **HALSBURY'S LAW OF ENGLAND 4th Edition** **Vol 1 (2) & Vol 42**
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