PROPERTY TRANSFERS AND TRUST ACCOUNT THEFT: A R720,000 WARNING

“The issue of whether a conveyancing attorney receives the money as the agent of the seller, or of the purchaser, or of both, or as trustee for both to await the event, is a somewhat vexed question … and each case must be considered in the light of its own facts and the particular contractual terms under which the conveyancer received payment” (Extract from judgment below)

A lot of money changes hands in property sales, and for many of us buying or selling a house is the largest single financial transaction of our lives.

A recent High Court judgment involving a theft of R720,000 by a dishonest conveyancer (transferring attorney) provides a timely warning to both buyers and sellers to proceed with extreme caution. And as always, the core message to both is this: Sign nothing without your lawyer’s advice!

The conveyancer who stole from her trust account

* A seller sold a sectional title unit to a buyer for R720,000. The sale agreement provided for payment in full by the buyer to the conveyancer, the funds to be held in trust in an interest-bearing account until transfer, interest to accrue for the buyer’s benefit.

* The conveyancer had, as is usual unless otherwise negotiated, been nominated by the seller. In this case the buyer asked to use her own attorneys but the seller “vehemently” insisted on nominating his attorney.

* On request from the conveyancer, the buyer paid the R720,000 (plus R16,700 towards the transfer costs payable by her) into the conveyancer’s trust account.

* When later it became clear that the conveyancer had stolen these funds, the buyer demanded transfer from the seller. The seller refused – the money was gone and he wasn’t prepared to lose both his property and the purchase price.

* At the same time however he (the seller) lodged a claim with the Legal Practitioners Fidelity Fund, which was at that time still called the Attorneys Fidelity Fund and is referred to below as “the Fund”. In the event of such a theft, the Fund will in its own words “assist you with the reimbursement of your monies if your claim is valid.”

* However, the Fund refused to pay the seller’s claim because of its view that the loss was sustained by the buyer, not by the seller.

* The buyer disagreed. It wasn’t, she said, her loss, it was the seller’s. She wasn’t going to now pay the purchase price over again and then have to claim from the Fund. So she asked the High Court to order the seller to pass transfer to her.

* What the Court had to decide is whether or not the conveyancer was the seller’s agent to receive payment of the purchase price from the buyer. If so, the buyer had paid and was entitled to transfer. If not, the buyer had not paid and had no right to transfer.

* The danger for both seller and buyer here is that as the Court put it “the issue of whether a conveyancing attorney receives the money as the agent of the seller, or of the purchaser, or of both, or as trustee for both to await the event, is a somewhat vexed question … and each case must be considered in the light of its own facts and the particular contractual terms under which the conveyancer received payment.”

So whose agent was the conveyancer?

In the end the Court ordered the seller to pass transfer to the buyer, finding on the facts and on the Court’s interpretation of this particular payment clause that:

* The conveyancer in this matter had acted as agent for both the buyer and the seller – as agent for the buyer in investing the funds pending transfer, but as agent for the seller in receiving payment of the purchase price.

* Accordingly the buyer “complied with her obligation in terms of the deed of sale by making payment of the purchase price to the [conveyancer] who was nominated by the [seller] to receive payment of the purchase price on the latter’s behalf”.

* “In addition, the Deed of Sale provided for the mode of actual payment of the purchase price and once this was done, the [buyer] had discharged her obligations. She did what was required contractually in respect of the purchase price and had no control of the process thereafter.”

The seller is therefore down R720,000 plus costs, and will be hoping that the Fund will now pay out his claim without further ado.

Sellers

Choose a competent and trustworthy conveyancer. Don’t ever be railroaded by anyone into appointing someone else! And if your attorney isn’t also an admitted conveyancer, ask him/her for a referral to a trusted colleague who is.

Buyers

As we saw above, the wording of the sale agreement is central to the level of risk you run - it should be clear that in paying the purchase price to the conveyancer you are paying the seller in complete discharge of your obligations under the sale agreement.

Bottom line – as always, ask your attorney for advice and assistance before you sign anything!