

THE NOMINATION OF A CONVEYANCER IN KWAZULU-NATAL

In a contract for the sale of land, one of the clauses to be negotiated is whether the conveyancer will be nominated by the seller or the purchaser. If the agreement is silent on the appointment of the conveyancer, it was held in the case of *James versus Liquidators of the Amsterdam Township Company 1903 TS653* that under the common law a seller was entitled to nominate the conveyancer even if the purchaser paid the costs of transfer. In the Natal case of *Kothandan versus Arbuthnot 1920 NPD 223* the court held that there was an existing custom recognised throughout Natal that *in the absence of any special stipulation*, the purchaser had the right to nominate the conveyancer. It is important to note that the court observed "that cases to which that custom is applicable have become less numerous owing to greater resort being had to special stipulations in favour of the seller's conveyancer; but I cannot take it that it has for that reason become any the less the custom". It is also instructive to note that Dove-Wilson JP stated that "the evidence shows that after James' case became known in Natal it became usual to stipulate in the contract that the seller should appoint the conveyancer." Counsel submitted that this practice illustrated "that the custom has changed" i.e. in the 17 years following the James' case.

The Arbuthnot ruling that the custom established by evidence would be "recognised as the local common law" was of little consequence because in the same judgment the court recognised that in most cases the conveyancer was nominated by the seller. A strange custom if sellers universally took steps to avoid the custom!

Insofar as the courts may have established the existence of a custom in 1920, it is submitted that the custom was already in the process of being abrogated by disuse. Certainly in the subsequent 82 years the custom has not been observed for the reason that it is unsuited to modern conditions. Writing in 1982 in his book

on Legal Ethics, Lewis noted that in Natal there had in the past been an expectation that the purchaser's conveyancer would be instructed but that this was "now changing, the choice being left to the discretion of the parties." In the only case which commented on the Arbuthnot case, namely Meyer versus Kirner 1974 (4) SA 90 (N), the court observed without comment what had been held in the Arbuthnot case "in the absence of any special stipulation".

The abrogation of the former colonial custom is well illustrated by the printed sale agreement forms used by estate agents in Kwazulu-Natal. They invariably record that the conveyancing will be attended to by the seller's conveyancer. (Regrettably estate agents often persuade sellers to use a conveyancer recommended by the agent which is an unfortunate and undesirable development and contrary to the Code of Conduct of Estate Agents.)

During negotiations concerning sales of land, Kwazulu-Natal conveyancers acting for the purchaser have sometimes sought assistance from the Arbuthnot case in an endeavour to be nominated as the conveyancer. Sellers however who were properly advised have insisted on the right to nominate the conveyancer and with good reason. It is the seller's duty to deliver or convey the property to the purchaser. Some of the reasons why, in most instances, a seller should nominate the conveyancer are :

1. The party more likely to delay the transfer or breach the terms of the agreement is the purchaser. The purchaser is required to raise and pay the purchase price and transfer costs. The seller is required only to transfer the property. Experience shows that a conveyancer nominated by the purchaser is placed in a dilemma when his client does not perform. He is loathe to report the delay or failure to the seller. Furthermore because he acts for the [Purchaser he suffers from a serious conflict of interest when it becomes necessary to](#) place the Purchaser in mora and claim penalty interest. The conveyancer is therefore obliged to advise the seller to seek independent legal advice. This is not always done timeously.

2. The most important responsibility of a conveyancer is to ensure that transfer of the property does not pass before the purchase price is secured. It is easier for the seller's conveyancer to insist that the purchase price be properly secured. A purchaser might persuade his own conveyancer to rely upon his assurance that the money will be available on transfer. If the money were not forthcoming, that would be to the detriment of both the seller and the conveyancer.
3. The property remains in the [ownership](#) of the seller until the date of transfer. It is therefore logical that the conveyance of the property should be in the hands of a conveyancer known to the seller and acting for the seller.
4. The argument is sometimes advanced that as the transfer duty is payable by the purchaser, the purchaser should nominate the conveyancer. That argument falls away where the transaction is subject to value-added tax which is payable by the seller.
5. Where the property sold is part of a development such as a township or sectional title scheme, the conveyancer is required to co-ordinate the sequence of various transactions necessary for registration. The seller's conveyancer will be the best placed to know of the peculiarities attaching to the transactions such as the creation of servitudes, the imposition of conditions of title, the need to join a Homeowner's Association and so forth. It would be unworkable for each purchaser in a township development to have his or her conveyancer attend to the transfer of that purchaser's subdivision.
6. The Arbuthnot case recognised that in auction sales the conveyancer is nominated by the seller. It would be unwise for a seller in those circumstances to place the transfer in the hands of an unknown

conveyancer recommended by the purchaser. Similarly where the seller acts in a representative capacity such as a liquidator or executor, the seller's own legal representative generally has easier access to the information required for the conveyancing process.

There are instances where it is preferable for the purchaser's conveyancer to act. Those instances revolve mainly around land assemblies undertaken on behalf of a purchaser. Where a number of properties situate in different Provinces are being acquired and the purchasing company is to be listed on the Securities Exchange, it makes sense for one conveyancer to co-ordinate the transfers and ensure that all the transfers are registered simultaneously or within a day of each other. The sellers' conveyancers will generally monitor progress and liaise with the registering conveyancer nominated by the purchaser.

Regardless of by whom the conveyancer is nominated, the conveyancer owes a duty of care to both the seller and the purchaser. If a dispute arises between the seller and the purchaser, the Law Society Rules recognise that if it was clear to the purchaser that the conveyancer was nominated by and was acting on behalf of the seller, the conveyancer may institute legal action against the purchaser to compel the purchaser to perform in terms of the contract. This accords with the logic of the conveyancer being appointed by the seller. On the other hand if the conveyancer were to be appointed by both parties acting together or if an unavoidable conflict of interest were to arise, then although the conveyancer may continue to handle the conveyancing, he or she should recommend to the parties that they consult their own attorneys to take action to resolve the dispute.

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