

The standard of care owed by a licensed conveyancer

By ROGER MARSHALL



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DOES A LICENSED conveyancer owe the same duty of care to his or her client that a solicitor would owe to his or her conveyancing client? This was recently the subject of obiter dicta by two judges in the NSW Court of Appeal in the matter of *Benson v MacLachlan* [2001] NSWCA 263.

The relevant facts were that Mr Benson signed a contract to purchase land on Sydney's North Shore for \$2.25 million in unusual circumstances. The contract was, on exchange, a pre-incorporation contract, with the purchaser noted as Mr Benson and another natural person "on behalf of Pacific Palms Pty Limited a company yet to be incorporated".

It was proven at the hearing that Mr Benson had no interest in the land to be purchased nor in the company yet to be incorporated. It was also proven that Mr Benson was a client of the licensed conveyancer, such conveyancer accepting a fee of \$600 for the retainer. In due course the purchaser was incorporated (although under a different name) and ratified the contract. However, the purchaser did not complete and the vendors terminated the contract for sale. The vendors then sued Mr Benson for compensation pursuant to the then s.183 of the *Corporations Law*. Mr Benson joined the conveyancer as a cross-defendant in the District Court proceedings.

At trial the licensed conveyancer who said she explained the contract to Mr Benson before exchange

admitted that she knew nothing of s.183 of the *Corporations Law*. However, on some peculiar facts involved in this case (and which are not relevant here) Mr Benson failed in the District Court to obtain an indemnity or contribution from the licensed conveyancer.

"The Conveyancers Licensing Act 1995 ... enables qualified conveyancers, in effect, to do any conveyancing work, and not simply easy conveyancing work."

In evidence before the Trial Judge was an unchallenged report of Mr Moses, an expert conveyancer and longstanding solicitor. In his report Mr Moses equated the duty of care owed by a licensed conveyancer to that of a solicitor retained for the purposes of a conveyance. Mr Moses included in that duty an obligation to advise on the effect of a pre-incorporation contract and the relevant provisions of the *Corporations Law*, then s.183. The Trial Judge found that Mr Moses "... overly equates the duty of a Licensed Conveyancer to that of a solicitor".

On appeal the matters for decision were restricted to issues of credit and other factu-

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al matters. However, two of the judges of appeal took the trouble to comment on the standard of care owed by a conveyancer to his or her client. Those two judges were at odds on the subject.

Meagher JA said: "Mr Moses, the celebrated expert in these matters, stated that in his view a conveyancer in a conveyancing matter owed the same duty of care to his clients as a solicitor would have if handling the same matter. His Honour disagreed; he said the conveyancer had a somewhat lower standard. If it matters, my view is that Mr Moses is right and his Honour is wrong. The statutory provisions which deal with the matter are principally contained in the *Conveyancers Licensing Act 1995*. It enables qualified conveyancers, in effect, to do any conveyancing work, and not simply *easy* conveyancing work. This is the pronounced will of the Parliament as the culmination of a long and virulent campaign by conveyancers who asserted that solicitors were not needed in the area of conveyancing. They achieved

this objective, they are now placed on an equal standing with solicitors in that area of legal practice, and they ought to have the same liability."

Handley JA disagreed. He said: "Licensed conveyancers are not qualified for admission as legal practitioners and are not entitled to hold themselves out as so qualified. They do not have law degrees and the public know or should know these basic facts. They are capable of doing conveyancing work which does not require the full legal knowledge which solicitors are expected to possess. They can and do provide a basic service at a basic cost. They should not be expected either by their clients, or by the courts to provide a champagne service for what amounts to a beer price."

The third member of the Court, Heydon JA declined to express an opinion on that subject as it was not necessary to determine the result of the appeal.

Accordingly, at present licensed conveyancers will have to await the outcome of some future case to determine

what the standard of care is that they owe to their clients.

It should be recalled that like solicitors, licensed conveyancers are permitted to carry out "legal work" which is defined by sub-s.4 of the *Conveyancers Licensing Act 1995*, for the purposes of s.4 of the Act, to mean "work that, if done for fee or reward by a person who is neither a solicitor nor a barrister, would give rise to an offence under Part 3A of the *Legal Profession Act 1987*". The only legal work allowed to be carried out by a licensed conveyancer is legal work carried out in connection with any transaction that creates, varies, transfers or extinguishes a legal or equitable interest in any real or personal property (s.4(1) of the *Conveyancers Licensing Act*). Specifically excluded from such work are the seven items of work specified in sub-s.4(3), such as a mortgage on a non-residential property where the amount secured by the mortgage exceeds \$7 million.

Licensed conveyancers are subject to the same disciplinary measures as solicitors. Part 10

of the *Legal Profession Act* applies to licensed conveyancers, by s.82 of the *Conveyancers Licensing Act*. When that provision was introduced by the Conveyancers Licensing Bill and read a second time, the Minister said of the link between the disciplinary provisions of the *Legal Profession Act* and that for licensed conveyancers: "The Bill retains this link because the professional conduct of conveyancers is the same as that expected of solicitors. Licensed conveyancers must maintain the high ethical standards which their clients and the community expect."

Further, licensed conveyancers enjoy the same status as solicitors for the purposes of several statutory provisions, for example s.96I of the *Real Property Act 1900*, s.16 of the *Retail Leases Act 1994* and s.66P of the *Conveyancing Act 1919*.

Given these matters there would appear to be strong argument for preferring the views expressed by Meagher JA that a licensed conveyancer's standard of care equates to that of a solicitor carrying out a conveyance. □

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