

The Name!

By Lorren Wilson

“What’s your mother’s name? What’s your father’s name? What parish are you from?” All of us have answered these and other probing questions at some time during our lives. Let’s face it, it’s almost a Bermudian tradition. What you may or may not realize is that the (local) knowledge gained from asking these questions can be put to good use in the work place.

This article will discuss the responsibilities of your lawyer to a lending institution when preparing a mortgage deed. It will also illustrate the value of any local knowledge he may possess in discharging his responsibilities.

Everyone is aware that buying a house in Bermuda can be a very expensive proposition. Most of us usually seek the assistance of a lending institution to help finance the purchase. The usual process is for a prospective purchaser to attend a lending institution and complete the necessary application forms and interviews. After receiving approval for financing, lending institutions will send mortgage instructions to your lawyers to prepare a new mortgage deed. (It is important to note that when preparing a mortgage deed your lawyers client is the lender, not you.)

In Bermuda a legal mortgage is a “conditional” conveyance of the legal title of the house, being mortgaged, to the person or institution that lends you the mortgage money. Lenders, being no different than any of us, will require good legal title to the house before releasing the mortgage proceeds.

The responsibility for providing good legal title to the lender (and ultimately to you) rests with the lawyer who receives instructions to prepare the new

mortgage deed. In the instruction letter lenders will require your lawyer to certify that title to the house is good, that there are no prior liens on the house, that all searches and inquiries have been made, that there are no recorded “encumbrances” by way of mortgage or judgment on the house and that the lenders interest will represent a valid and enforceable (first) legal mortgage. As you can see there is a heavy onus on your lawyer to ensure that the lender receives good title.

Simply put, having good title is being able to say that you own the house without anyone else being able to maintain a claim to it in any way. For instance, you would not have good title to a house if the person selling it to you had a judgment recorded against his name or if there was a mortgage recorded against the house. It’s all a matter of priorities.

The Real Estate Assets Act 1787 provides that a judgment debt against a person can be enforced against any real estate which they own. The consequence of this, is that if the seller has a judgment debt recorded against his name the person to whom he owes the money can ultimately satisfy the debt (after the necessary legal formalities are complied with) by selling the house you intend to purchase. A judgment debt would prevent the lender from having good title.

Similarly, if the seller has a mortgage on the house and that mortgage is not "paid off" before you purchase and subsequently mortgage it to your lender, your lender's mortgage will be second in priority to the first mortgage. The practical effect of this is that if the house has to be sold to satisfy a mortgage debt, the lender who has the first mortgage would be entitled to the sale proceeds first. Any remaining proceeds would then go to your lender. As stated above, most institutional lenders will insist on having a first legal mortgage.

To discover whether a judgment has been recorded against a seller's name, lawyers or their assistants, will go to the Supreme Court Registry and search the book of judgments for the names of the previous owner (s) of the house. They will also attend the Office of the Registrar-General and search the book of mortgages for the names of the previous owner (s) of the house in order to determine whether there are any mortgages on the property, which need to be "paid off".

A person with local knowledge, has a valuable asset, when searching these books. Think about it. How many times have you seen someone's name incorrectly spelled "Simmons" when you know the

person and know that their name is "Simons". How many people do you know that use their middle name, instead of their first name. The abundant use of nicknames can also cause problems for the unwary. Possessing local knowledge can make the difference in discovering whether a judgment has been entered against a seller's name or a mortgage recorded in the book of mortgages.

Hopefully the things discussed above have provided you with a brief insight to your lawyer's responsibilities when preparing a mortgage deed to assist with your purchase. I'm sure you will agree, possessing that extra bit of local knowledge will greatly enhance his chances of discovering any possible liens on the house and discharging his duty of delivering good title to the lender and ultimately to you.

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