

Avoid pitfalls when purchasing freehold property
by Stephen Males

There are two options when investing in residential property in Bermuda, namely a freehold house or a condominium unit. Of the two, the freestanding house on its own parcel of land remains most popular.

When acquiring a freehold property, it is important to know the necessary steps to take and the possible pitfalls to avoid. Most importantly, avoid signing anything until all negotiations concerning the transaction have been finalised.

The Bermuda Bar Association has approved a standard form sales agreement that is now being used by most law firms and real estate agents on the Island. The relatively common practice of splitting the legal costs and government stamp duty obligations equally between the seller and the purchaser is captured in the standard agreement. Legal fees are fixed by the Bar Association, and calculated on a sliding scale according to the value of the property. Property attorneys will normally provide an early estimate of legal fees and stamp duty.

The standard form agreement makes the seller responsible for providing evidence of good title (or ownership) to the property, which will ensure that no one makes a claim against the purchaser's new home. After the agreement is signed, the purchaser's attorneys will examine the title deeds to ensure that said title is satisfactory. If a title defect is discovered, the purchaser may withdraw from the contract and walk away with the deposit and any accrued interest.

There will be occasions when the standard form agreement will have to be amended to protect a purchaser's interests.

The agreement may need to include a special condition that requires the seller to have the boundaries of the property surveyed by a professional land surveyor before the sale is completed. This assists the purchaser in confirming the property's size, dimensions and the location of its boundaries. It is important to walk the property to look out for any paths or roadways that are being enjoyed by the owners or occupiers of neighbouring properties, and to look for any obvious boundary encroachments. Be sure to mention any findings to your attorney early in the negotiations.

The purchaser might consider a structural survey, particularly if dealing with an older house such as a traditional Bermuda cottage. A professional surveyor examines a house for structural integrity, termite infestation and other potential problems. However, no survey will guarantee revealing defects such as the risk of future subsidence or faulty foundations that have not yet caused problems. Be sure to examine any appliances or other chattels being sold, and log their condition. Those items should be in a similar condition on the closing date of the transaction. Remember – the prevailing rule is buyer beware!

If a mortgage is being sought, the sales agreement should allow the purchaser to walk away from the agreement should financing not be available.

Once these and other issues have been negotiated, the purchaser and seller will be ready to sign the agreement, which is binding when it is signed by both parties, is dated and the deposit (which is normally 10 per cent of the purchase price) is paid. The seller's attorneys usually hold the deposit until the transaction has completed. The value of taking proper legal advice before signing on the dotted line is therefore particularly important. If either party fails to meet their contractual obligations, they may find themselves being sued for damages and/or forced to complete the transaction.

After the agreement is signed but before the date of completion, the purchaser's attorneys will ensure that no unlawful development has been carried out on the land without the consent of the planning department. Without this safeguard, the purchaser would become liable for any such changes, even if not responsible for them. This must be initiated immediately after the agreement is signed, as a planning search takes 28 days to complete.

Where a mortgage is required, and the purchaser's attorney is also acting for the bank, the attorneys will report to the bank that the property provides adequate security for the mortgage advance. The purchaser's attorneys will tell the purchaser how much money is required to cover not only the purchase price less any deposit, but also his own legal fees and stamp duty that will be incurred on the agreement, the transfer deed (Conveyance) and the Mortgage Deed where one is required. This way, the purchaser is able to organise the funds well before the completion date.

The purchaser's attorneys will draft the Conveyance and arrange for it to be signed by their client. On the day of completion the purchaser will be provided with the keys, either by the real estate agent or by the seller's attorneys. Organisation is essential – without funds, the keys are unlikely to be delivered.

The purchaser's attorneys will hand over the purchase funds. A cheque will be sent to the seller's attorney to cover the full sale amount less the deposit, any legal fees and stamp duty that the seller may be responsible for, as well as any land tax arrears and any monies required to satisfy existing mortgages over the property.

The last task is to toast the purchaser on the successful, and safe, acquisition of a new home.

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This column should not be used as a substitute for professional legal advice. Before proceeding with any matters discussed here, persons are advised to consult with a lawyer.