

Double sales: who wins?

It seems to happen quite frequently that sellers of property sign contracts of sale with more than one purchaser. The problem is sometimes solved automatically where only one purchaser gets a loan. What is, however, the position where there is more than one enforceable contract in respect of the same piece of land?

One of the possible scenarios was again recently considered in the case of *Meridian Bay Restaurant (Pty) Ltd v Mitchell* SC NO (686/2009) [2011] ZASCA 30 (30 March 2011). The developer in this case developed the Harbour's Edge Sectional Title Scheme in Gordon's Bay, Cape Town. He fraudulently created additional units out of the common property and transferred these to entities controlled by him. The Body Corporate sought, as the entity charged with the administration and control of the common property of the scheme, to recover that which was fraudulently removed from the unit holders in the scheme, i.e. an undivided share of the common property that ought in terms of the contracts of sale to have been in existence when the Body Corporate was first established.

The Supreme Court of Appeal applied the doctrine of notice. This doctrine provides that if A sells property to B (but has not yet delivered it to B) and then later sells it to C and delivers to C, then C's right to the property prevails over B's right to the property, unless at the time that C bought the property, he knew that it had been previously sold to B.

On the facts the court concluded that the developer was indeed aware of the rights of the Body Corporate and was consequently obliged to transfer the additional units back to the Body Corporate.

The principles in respect of double sales, to which we also alluded to in a previous newsletter, can be summarised as follows:

1. Where the property has not yet been transferred: Purchaser 1 (with the earlier dated contract of sale) will be able to claim transfer of the property from the seller and purchaser 2 will have to sue the seller based on breach of agreement.
2. Where the property is already registered in the name of purchaser 1: Purchaser 2 will not be able to claim the property and will have to sue the seller for breach of the agreement.
3. Where the property is already registered in the name of purchaser 2: If purchaser 2 was not aware of purchaser 1 when the contract of sale was

signed, he can keep the property and purchaser 1 cannot force him to transfer it to him. Purchaser 1 will then have to sue the seller based on breach of the agreement. If purchaser 2, however, was aware of purchaser 1 when he signed the contract, purchaser 1 can indeed force purchaser 2 to transfer the property to him. This is in terms of the doctrine of notice referred to above.

4. Where the property is registered in both purchaser 1 and purchaser 2's name, in other words without the deeds office picking up the problem when the second transfer was done (these were actually the facts in a recent decided court case): The principle of "first in time, first in law" will apply. This means that the purchaser who took transfer of the property first (irrespective of whether his contract was signed first) will be entitled to keep the property. The other purchaser will have to sue the seller based on breach of agreement.