

THE EVOLVING FACE OF REAL ESTATE PRACTICE

CONVEYANCERS TODAY FACE A SIGNIFICANTLY DIFFERENT MARKET FROM A DECADE OR TWO AGO. NORMAN HO IDENTIFIES THE NEW AND DEVELOPING AREAS OF REAL ESTATE PRACTICE, AND SHARES HIS VIEWS ON THE RELATED EXPERTISE REQUIRED OF LAWYERS AND WHAT PRACTITIONERS CAN EXPECT IN THE YEARS AHEAD.

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CONVEYANCING

Once only associated with residential and mass-market retail transactions, has evolved quietly over the years and the change has accelerated over the last 20 years or so. It has now developed into a sophisticated practice area with a growing emphasis on complex structures, involving complicated arrangements and associated financing instruments. Many transactions now involve work that is outside the realm of usual retail conveyancing matters, and which is focussed instead on corporate clients and large building transactions.

NEW AREAS

Institutional real estate

Due to the growing global economy, there has been a sharp increase in the number of institutional investors, global property funds, public-listed real estate companies, government-linked companies and onshore and offshore special purpose vehicles purchasing properties in Singapore. These institutional clients have poured their resources into acquiring whole buildings and parcels of land for development in Singapore, and they rely on lawyers to protect their interests. The real estate properties which they acquire include commercial buildings, office units, residential properties, warehouses, industrial plants, hotels, resorts and power plants, among others.

Such projects are usually high-profile and complex. Lawyers acting in these projects should be armed with expertise in an array of conveyancing matters, including being familiar with the compliance of regulatory

requirements, deal structuring, drafting and negotiating management agreements, funding and divestment activities, land use, planning regulations, government land tenders, investigation of title and property due diligence.

The complexity of these projects also mean that in order to deliver an integrated solution to clients, the law firm involved will have to work across legal disciplines to deal with the wide-ranging legal issues that may arise. For example, in an acquisition of an uncompleted building, conveyancing lawyers will have to work closely with construction lawyers to negotiate and draft the Sale and Purchase Agreement with regard to terms like the appointment of project consultants, treatment of defects and assignment of various building works contracts. Also, issues like assignment of intellectual property rights to a building's name, trademark and goodwill will involve intellectual property lawyers.

More particularly, when assisting a client to acquire land parcels for development or re-development, the lawyer usually further assists the client in the development of the project on the same land, together with all aspects of subdivision. Often, he or she would have to assist the client in applying for its Housing Developer's License and consult with the Controller of Housing on the client's behalf. In relation to planning and land use issues, lawyers have to advise on land use conditions, permissible gross floor area, change of use and re-zoning, if any.

Where the property involved is a leasehold property (for example, land that

is leased from government bodies such as Urban Redevelopment Authority, Jurong Town Corporation (“JTC”), Housing Development Board (“HDB”) and Sentosa Development Corporation), there may also be issues in relation to the upgrading of the lease tenure and uplifting of lease conditions for the purposes of development or re-development.

A law firm’s information technology and management procedures are crucial to the handling of these projects to complement its legal expertise so that its lawyers can deliver large volumes of work in a short time, to provide high-speed information retrieval capabilities and up-to-date progress reports. This enables the lawyers to effectively manage mega-sized and complex projects and quickly respond to clients’ business needs in a fast-moving market.

It is likely that we can expect to see sustained growth in this area of practice. As land in Singapore continues to be considered valuable and profitable to possess, institutional clients will no doubt continue to be attracted to acquire properties here.

Real Estate Investment Trusts (“REITs”)

REITs first made its appearance in Singapore’s financial market through the debut offering in 2002 and over the years, there are many REITs that have been set up in response to the public’s fervent demand. Whilst still a burgeoning industry, this is widely

acknowledged to be an important growth area in the legal domain.

REITs are governed by a wide spectrum of legislation and guidelines. The lawyer involved in a REIT transaction must be familiar with the regulatory framework governing the trustees and the fund, including the Securities and Futures Act, the Listing Manual of SGX-ST, the Code on Collective Investment Schemes and the Property Funds Guidelines, the Code of Corporate Governance 2005 and the Companies Act.

The REIT lawyer also has to be familiar with a various aspects of corporate real estate practice, namely sale, acquisition and leasing. For REITs that acquire industrial properties situated on sites owned by JTC or HDB, numerous applications have to be made to obtain consents from these government bodies for the purchase. The documents to be drafted in a usual REIT transaction include the Put and Call Option Agreement, Sale and Purchase Agreement and Lease-back Agreement, and there are usually extensive negotiations between the seller and the REIT in the preparation of these documents.

In this regard, commercial sense is also expected of the REIT lawyer. As such, the lawyer should be aware of the operational and management structure of the REIT, and more importantly, its commercial concerns so that clauses addressing the same can be

incorporated into the legal documents. For example, sellers are usually obliged under the terms and conditions of the Lease-back Agreement to take up maintenance works to the building. This is a strict requirement, as REITs often require that only buildings of a certain grade and quality be bought. A non-REIT buyer may not be as concerned about this requirement.

The pace of growth of REITs has been described by those in the industry as phenomenal and it has evolved to become a significant asset class in our financial landscape. As the government continues to promote Singapore as an attractive and competitive jurisdiction for establishing REITs, this area will no doubt continue to expand.

Collective sales

In 1994, the first en-bloc sale was transacted, paving the way for many more developments. Due to Singapore's severe land constraints, en-bloc sales are the main source of prime freehold land. Collective sales are a creative way of freeing up land and utilising increased plot ratios to realise the full developmental potential of such land.

The lawyer involved in a collective sale transaction has to take his or her client through the entire sale process from the appointing of the property consultants, to forming and advising the sale committee of their responsibilities, drafting and negotiating the Collective Sale Agreement (with the owners) and

the Sale and Purchase Agreement (with the purchaser), appearing before the Strata Title Board, to successful completion of the transaction. He or she must be aware of the many issues and concerns specific to that particular project.

The sheer volume of the transaction should also be noted when the lawyer acts for the sellers. As most projects consist of numerous units, the usual checks on title and bankruptcy/winding up searches done in one traditional conveyancing transaction has to be multiplied, and in some projects, several hundred times over. To raise the standards of governance and disclosure in such transactions, the government also introduced new amendments to the legislation in 2007, thereby increasing the responsibilities of the lawyer. Amongst others, he or she must now witness the signing of the collective sale agreement by each owner, explain the legal terms and liabilities of the agreement to each owner, and also address any issues raised by the owners.

One special feature of collective sale transactions is that they can become particularly acrimonious. As such, litigation lawyers are often involved. In the first half of 2007 we saw the collective sale frenzy reaching a fever pitch, with an unprecedented and unparalleled 58 deals closed. Amid the exuberance fuelled by

sky-rocketing prices, high-profile legal tussles between owners and purchasers became a common feature. Hostility is often created between consenting owners and non-consenting owners or owners who have consented but sought ways to rescind their consent to the sale agreement. Many who were set against the sale raised objections by relying on legal technicalities to thwart the sale. Dissenting voices also complained that rights of minorities were often railroaded in a transaction where “tyranny of the majority” operated.

To avoid such situations, extra care must therefore be taken by the lawyer from the outset to comply strictly with all legislative requirements under the governing Land Titles (Strata) Act, and to advise on the rights and responsibilities of all owners (regardless of whether they are for or against the sale) clearly and fairly.

Whilst en-bloc waves ebb and flow with market conditions, with a projected population of 5.5 million in the future and the urgent demand for more land, collective sales will no doubt continue to play a crucial role in urban land renewal in Singapore.

Real estate finance

The practice of real estate financing has changed drastically over the years. No longer do conveyancers only deal with traditional mortgage securitisation relating to the sale and

purchase of residential properties. These days, there is a broad spectrum of securitisation and structured real property related financing transactions. This is closely tied to the increased servicing of institutional clients as aforementioned. In their acquisition of buildings and land parcels, lawyers will represent the corporate borrowers or the domestic and foreign banks, finance companies and institutions.

Such clients usually require advice relating to syndicated loan facilities, and the lawyer’s expertise should include advising on bridging loans, compliance and regulatory issues, land and construction loans, loan structuring and restructuring and project management. The security documents that the lawyer will draft and negotiate upon are usually the Facility Agreement, Sale and Lease-back Agreements, Mortgage, Assignment of Rental Proceeds/ Maintenance Contracts/ Insurance, and others. Tax and revenue issues are addressed as well in a typical transaction.

Whilst still rare in Singapore, Islamic banking is an up and coming niche area that some real estate financing lawyers have been involved in. The Islamic banking industry is now worth almost an estimated US\$1 trillion and is widely considered to be one of the fastest growing sectors in the world of finance. Even in the midst of a global economic crisis, Islamic banks have weathered

the storm thanks to strict regulations administered by Islamic law, or *Shari'ah*. The Islamic banking industry is expecting growth rates of 15% annually.

The lawyer in such transactions should have the expertise to help clients finance projects through *Istisna'a* (contract of exchange with deferred delivery) and *Ijara Mawsufah fi al Dhimmah* (forward leasing) tranches; advise them on credit facilities and real estate acquisitions involving a *Musharakah* agreement (joint enterprise or partnership structure with profit/loss sharing implications that is used in Islamic finance instead of interest-bearing loans) with conventional debt providers and Islamic investors; guide them through the introduction of Islamic mortgage products and insurance policies abiding by Islamic insurance concepts, and make sure that all terms and conditions are *Shari'ah* compliant.

DOES SIZE MATTER?

While any conveyancer can practice in these new developing areas as long as he or she possesses the requisite expertise, one possible obstacle to such practice would be the nature and size of the law firm he or she is at. First, some firms may not have sufficient insurance coverage for such complex and large deals. The stakes are high in these transactions, which are typically worth millions or even

billions. Additionally, most banks have policies of only appointing law firms with the requisite minimum amount of insurance coverage.

Second, manpower problems, already a reality even for larger legal practices, are made more acute in smaller ones. As mentioned, such high-end transactions entail multiple layers of checks, cross-disciplinary legal services and large volumes of documentation. Unlike their bigger counterparts, it would be a disadvantage if the smaller firm does not have as many specialised lawyers practicing in different fields, or sufficient secretarial support, legal executives and junior lawyers at their disposal. Third, emphasis on high-technology in a fast-moving market could pose a problem to small firms with less resources to invest heavily in information technology.

This, however, does not mean that the bigger law firms face no competition in these areas of work. Globalisation and Singapore's membership in the World Trade Organisation has opened the floodgates to free movement of goods and services, including legal services. In the same vein, the government has recently allowed



qualifying foreign law firms (“QFLF”) to practice in Singapore. In the area of conveyancing, these QFLFs are prohibited only from the practice of retail conveyancing. With their vast experience in dealing in high-end real estate transactions, there is no doubt that these large international firms would compete for a bite of the pie when there is further liberalisation of legal services in Singapore.

Notwithstanding that size does matter in such cases, all is not lost for small firms which can focus their energies in building a niche practice in mass-market retail conveyancing.

THE WAY AHEAD

For years, the public perception of conveyancing practice has been that it is a sunset industry. The abolishment of scaled fees in 2003 saw a dramatic decline in legal fees of conveyancers.

The recent practice direction by the Law Society of Singapore has gone further to withdraw the recommended fee guidelines for conveyancing transactions with effect from 1 October 2009 and with the complete liberalisation of conveyancing fees, it is no wonder that many conveyancers find it a struggle to sustain a business in pure mass-market retail conveyancing. In fact, with our UK and Australian counterparts already going the “do-it-yourself” way, some Singaporeans are questioning why we are not moving in a similar direction.

However, one should pause before labelling conveyancing a sunset practice area. It is erroneous to view the practice as straightforward, simple, or work that can be carried out by a secretary or a real estate agent. Even for the simplest and most typical of transactions – that of an individual setting out to sell or purchase a single property – the responsibilities and risks involved for the lawyer are numerous. His or her expertise cannot be replaced by an individual who is not legally trained.

With the entry of the new developing areas, even more is demanded in the skill of the lawyer. The growth of these areas have indeed reinforced the vital significance of conveyancing practice. As explained above, every one of these areas have evolved to become a vibrant and important part of the real estate industry. It would not be a stretch to say that these are just early days. There is still much room for these areas to grow and develop, and as it does, the expertise of the conveyancing lawyer will continue to be sought after.

The future of conveyancing practice remains bright – the demand for experienced conveyancing lawyers with sound knowledge of laws relating to real estate practice far exceeds supply. In land scarce Singapore with a rapidly growing and upwardly mobile population, property transactions are definitely here to stay. *is*