

Both parties? Unwise.

by IAN BRIGGS

THE FACTS

Mr Layton accepted instructions to act for both parties in connection with the sale of a house for \$800,000.00.

The Vendor, Mrs Stewart, then exchanged contracts for the purchase of another property, relying on the proceeds of the sale of her house to complete the purchase of her new house. The contracts were to settle simultaneously.

The Purchaser, Mr Creighton, had difficulties arranging finance and both settlement dates were deferred for a short period.

The solicitor was served with a Notice to Complete in respect of the purchase of the new property by Mrs Stewart.

The solicitor formed the view that a conflict of interest had arisen and advised Mr Creighton that he could no longer act for him. He then gave Mr Creighton a Notice to Complete on behalf of the Vendor in relation to the existing house.

However, the solicitor continued to act for the Purchaser in relation to the transaction pending the appointment of a new solicitor. Whilst he continued to act, he received information to the effect that the Purchaser's financial position was extremely precarious.

He neither informed the Vendor that he had ceased to act for the Purchaser, nor did he inform the Vendor of the information which had come into his possession.

On the day before the expiry date of both Notices to Complete, the solicitor was informed that the purchaser could not settle unless he received Vendor finance of approximately \$195,000.00. He rang the Vendor immediately and informed her of her options, namely providing Vendor finance to the Purchaser or obtaining bridging finance in relation to her own purchase. The Vendor agreed to provide Vendor finance, given the diffi-

culty of arranging bridging finance in the short time available.

Both contracts settled on this basis, however, some months later the Purchaser collapsed financially. After the first mortgagee of the property had exercised its power of sale and the Purchaser had become bankrupt the Vendor was still owed approximately \$173,000.00 which she no longer had any prospect of recovering.

She sued the solicitor on a variety of bases, including professional negligence and breach of fiduciary duty.

THE DECISION

In the Federal Court (*Stewart v Layton*, Dec 1992) Foster J found that the solicitor was in breach of his fiduciary obligation to the Vendor in failing to disclose to her information he had obtained in relation to the purchaser's financial problems at a point of time sufficiently early to enable an informed discussion to take place as to the steps to be taken if the Purchaser could not settle. He found that if such informed discussion had taken place, the option of Vendor finance would have been rejected.

He quoted with approval a passage from the decision of the Supreme Court of New South Wales in *Thompson v Mikkelsen*:

"It appears to me that the practice of a solicitor acting for both parties cannot be too strongly deprecated. It is only because of the possibility that something may be wrong in a transaction or may go wrong during its implementation, that employment of highly trained professional people at professional scales of remuneration can be justified. To scrutinise the transaction to discover whether something is wrong in a way that it may effect his interests, or to notice and deal with something that goes wrong during the transaction, is what a party employs such a person for. *He is entitled to*

assume that that person will be in a position to approach the matter concerned with nothing in mind but the protection of his client's interests against those of the other party. He should not have to depend on a person who has conflicting allegiances and who may be tempted either consciously or unconsciously to favour the other client or simply to seek a resolution of a matter which is least embarrassing to himself."

The Court found it irrelevant that the solicitor had acted at all stages with the best of intentions towards the Vendor.

The fact that he continued to act for the Purchaser and attempt to fulfil his duty to the Purchaser as well as the Vendor meant that he could not properly fulfil his duty to the Vendor.

Foster J also found that the solicitor had breached his duty of care, both in contract and tort, owed to the Vendor. The particular duty which arose was a duty to prevent the conflict which had arisen causing harm to her. At all relevant times, there was a foreseeable risk that the Purchaser may not be able to settle.

THE LESSON

The case serves as a sobering reminder of the evils of acting for both parties even in what appears to be the simplest of conveyancing transactions.

The fiduciary duty which is cast upon a solicitor in his relationship with his client is extremely high and the courts will not hesitate to scrupulously analyse his conduct in discharging that duty.

Knowing what to do when a conflict arises between the parties and recognising the conflict when it arises may not be enough in the circumstances to avoid a breach of fiduciary duty.

Bearing in mind the Court's hostile attitude to solicitors who act for both parties, solicitors are well advised to avoid the risk completely by refusing to accept instructions from both Vendor and Purchaser.

One wonders what a conveyancing agent would have done in similar circumstances.