

PLAZA REAL ESTATE

“CONFIDENTIAL”

Mortgagee Sales

Sales under Powers of Attorney

Sales by Companies

Deceased Estates

&

Infants

Sales Under Mortgagee, Power of Attorney, Deceased Estates et al.pdf

*Any Reference to
R&G changed to Special
Conditions



INTRODUCTION

The Real Estate Agent should be reminded that in the sale of land it will be necessary to ensure that the parties have capacity to contract. This requirement can cause difficulties when the "vendor" is acting in a representative capacity.

In this short paper brief reference will be made to the most common areas of difficulty namely:

- Mortgagee sales
- Sales under a power of attorney
- Sales by executors
- Sales by Corporations
- Sales to and by infants

The Sales Agency Agreement

Mortgagee Sales

Although the principal liability is upon the lender to ensure that the right to exercise the power of sale has arisen it is prudent for the agent to make initial inquiries to ensure that the proper notices of breach have been given and to ensure that that written notice of breach has been followed by the notice of sale.

Preliminary inquiries should be made of the mortgagee to ensure that the notices have been sent by ordinary mail to the last known address of the mortgagor.

A favourite tactic these days to thwart the mortgagee sale is for the registered proprietor to caveat the title a few days prior to the sale. A decision needs to be made at this stage as to whether the sale is postponed while proceedings warning the caveat are instituted or whether the sale should proceed but with an announcement as to the lodgement of the caveat.

If all is in order the mortgagee signs the Agency with the "Vendor" clause reading as follows:

A. "The 'Vendor' Quick Fix Money Lenders Ltd. a.c.n. 007 234 123 of 24
Grenfell St. Adelaide as mortgagee under and by virtue
of the power conferred in Registered Mortgage
No.....Bill Smith "Mortgagor"

Sales under a Power of Attorney

A power of attorney is a document that gives a person (called the donee) the power to act on behalf of the person or company who gives the power. The major act that regulates powers of attorney is the **Powers of Attorney & Agency Act 1984**.

There are really three types of "Powers of Attorney"

- A specific power of attorney
- A general power of attorney

- An enduring power of attorney

(Registered ASAP)

The "Specific power of Attorney" are not commonly found these days but can be identified by the fact that they are not headed "General Power of Attorney" or "Enduring Power of Attorney" or those words do not appear in the appointment clause of the document as is required by Section 5 or 6 of the Act for the creation of the other two types. With these it is most important that the document be carefully read to ensure that the "Attorney" is granted the power to sell Real Estate, sign the contract of sale and the conveyance of sale.

A "General Power of Attorney" can be identified from the heading or from the granting clause. Two factors need to be considered here. The first is to read the document and make sure that there are no limitations relating to the sale of real estate. The second is to inquire that the "Donor" is still alive and has not become mentally incapable of managing their own affairs nor has cancelled the power.

The only requirement to consider with an "Enduring Power of Attorney" is to ensure that the "Donor" is still alive and has not cancelled the "Power".

If the power is to be used for the purpose of transferring an interest in land then it must be in a form which allows for lodgement at the Lands Titles Office and must be **lodged at the L.T.O.** prior to the transfer taking effect. Section 155 **Real Property Act** the original and duplicate are stamped the original being returned to the lodging party.

You should sight the original place a photocopy with the agency agreement and if the power has been granted some time previously type on the photocopy the following clause,

"We the appointee declare that the donor is alive and has not cancelled this power of attorney"

* have it signed

- Finally you should check that if there are more than one "Attorneys" do all need to give authority or is it any one of them or in some cases any two of them.

The Agency should read as follows:

A. "The Vendor" Bill Smith of 26 Palmerston Rd Unley 5061 (Enduring Power of Attorney No 8765432 granted to Matilda Smith 28/7/96 copy attached)

Matilda signs Bill Smith in the signing clause and then her own signature follows with the following clause

" Signed by Matilda Smith of 40 Paradise Rd. Paradise 5032 as ^{enduring} attorney for Bill Smith"

Sales by Executors

Upon the death of the Registered Proprietor the Agency Agreement is automatically cancelled by operation of law.

If the property is held as Joint Tenants then again by operation of law and the doctrine of "Survivorship" the property passes (upon note of death) to the survivor. Provided the survivor has signed the agency agreement no problem is encountered. If the property is not held as joint tenants then the only party capable of giving instructions after the death of the proprietor is the executor of the will. This power does not arise until probate of the will has been granted and the appointment sealed by the Supreme Court. The actual transfer of land cannot be effected until the land has been transferred into the names of the executors (The Transmission Application) which must be accompanied by a sealed copy of the grant of probate.

An Agent who takes instructions prior to the grant of probate runs the risk that the Will may be challenged as defective or that there is a later disposition which should take priority. Perhaps the nominated executor will refuse to accept the appointment all of which will cause delays in the grant.

If the proprietor has died without a will there will have to be an application to the Supreme Court for the appointment of an **administrator** of the estate under **Letters of Administration** which will then accompany a Transmission Application and the property will go into the name of the "Administrator". The property of the deceased will follow the statutory rules set out in Part 111A of the Act.

The Agency should read as follows:

A. "Vendor" Matilda Smith as the Executor of the Estate of Bill Smith (Deceased) pursuant to a grant of probate dated 28/9/97.

** attach etc a Grant of Probate.*

If the executor is one of the executor company entities that exist then they may sign in the normal company manner (see later) or as sometimes happens (e.g. with Public Trustee) a letter of instructions will come signed by the trust officer.

Sales by Companies

** IF PROBATE NOT YET GRANTED*

AS ABOVE... changed Subject to Grant of Probate

Since January 1984 all companies in Australia have had full contractual capacity and can buy and sell real estate just as any ordinary individual can.

A couple of points to watch are:

- If the company was incorporated prior to 1984 and it is purchasing then it would be prudent to check that the company has capacity in its "objects clause" in the "Memorandum of Association" to purchase land.
- Make sure that the ACN number appears immediately after the name as it forms part of the name by virtue of The Corporations Law. (Ratbag Pty Ltd ACN 007 123456)

The company can sign in a number of ways:

** (Also add) Matilda Smith as the Executor of the Estate of ...)*
accepts liability for costs of marketing and administration of property as well as

* N.B. if purchased by Company.

- There may be a property officer who holds a "Power of Attorney" in which case the signing is effected as described above.
- There may be a director who signs in which case the following would occur:
"Bill Smith for and on behalf of Ratbag Pty Ltd ACN 007 123456"
If this method is used a letter from Ratbag Pty Ltd should be obtained confirming the right of Bill Smith to sign documents on the Company's behalf. Often that letter will be itself signed by Bill Smith **BUT** the effect is that the letter will bind the company as a result of section 164 (3) of the **Corporations Law**.

No cooling
- off Right

- The Company may sign by its company seal in which case the signing clause will need to be amended to read:
"The Common Seal of Ratbag Pty Ltd ACN 007 123456 was affixed this 28th day of March 1997 in accordance with the Memorandum and Articles of the company and in the presence of
.....Director.....Director/Secretary"

With single shareholder/director companies the last section can be changed to readSingle Shareholder/director

Sales by Infants

Under the Real Property Act an infant (someone under 18yrs of Age) lacks the capacity to sell Real Estate and a Guardian for the purposes of the Real Property Act must be appointed by the Supreme Court. It is not sufficient for the parent to simply sign for them. This is a complicated procedure and can delay the listing of the property for some time.

The Contract of Sale

Mortgagee Sales

The agent must ensure that he/she has taken all steps to ensure that the rights of the **mortgagor** have not been recklessly prejudiced **BUT** there is no obligation to ensure that the best price possible has been obtained **Forsyth v Blundell**. Having said this there are some elementary steps which the agent should take to protect themselves against a claim of wilful neglect.

- Obtain a competent and fair valuation.
- Allow a reasonable time for advertising the property
- Carry out a modest but acceptable marketing plan.
- Maximise the potential of the property within a reasonable time frame i.e. if there are interested tenants organise the lease prior to sale (commercial properties).
- Ensure that the sale is by auction and that the auction is video recorded or taped.
- Neither the **Mortgagee** nor their nominee should purchase the property.

The contract should read as follows:

A "Vendor" Quick Fix Money Lenders Ltd acn 007 123456 of 24 Grenfell St. Adelaide 5000 as mortgagee under and by virtue of the power contained in Mortgage No..... (Bill Smith mortgagee)

In addition to the above ^{Other conditions} in R4 the following clause should be included:

"The parties to this contract agree that if prior to the settlement date any irregularity is discovered in the exercise of the power of sale by the vendor under the Mortgage referred to in Schedule A of this contract OR if any person by caveat or otherwise claims an interest in the land which in the opinion of the vendor will prevent or delay the vendor transferring good title in the land to the purchaser then the vendor may issue a written notice of termination to the purchaser setting out the cause of any such delay or prevention and return to the purchaser any deposit paid hereunder and upon such return this contract is terminated and neither party shall have any claim against the other or the Agent in respect of any matter arising under this contract."

Contracts Under a Power of Attorney

The same procedure is followed in the contract as was followed in the Sales Agency Agreement both as to the description of the "Vendor" and as to the manner of the signing of the execution clause. A photocopy of the sealed power is attached to the contract.

Contracts by Executors

Again the same procedure is followed in the contract as was followed in the Sales agency Agreement both as to the description of the "Vendor" and as to the manner of the signing of the execution clause. ^{The p/c Grant of Probate.}

If contrary to the earlier advice the sale has taken place prior to the grant of probate then the contract should contain the following clause in R4 of the contract:

^{Other conditions}
"The vendor declares and the purchaser acknowledges that the vendor is entitled to be registered as the proprietor of an estate in fee simple in the said land as the executor pursuant to the last will and testament of Bill Smith who died on the 25th day of March 1997

The parties agree that this contract is subject to the registration of the transmission by death of the land in consequence of the death of the said deceased in favour of the vendor on or before theday of.....1997
And the parties further agree that in the event that the transmission by death is not registered by theday of.....1997 this contract shall upon either party giving written notice of termination to the other be at an end and all money paid by the purchaser to the vendor under this contract shall forthwith be refunded in full and neither party shall have any further claim against the other or against the Agent in respect of any matter arising under this contract."

Contracts by Companies

Again the same procedure that was followed in the Sales Agency Agreement may be followed in the description of the parties and the execution clause in the contract.

Contracts by Infants

If the infant is selling then it can only be that an order appointing a Guardian has been made by the Supreme Court. In such a case the contract would read:

A "Vendor" Matilda Smith of 26 Palmerston Rd Unley as Guardian of Minnie Smith (an infant) pursuant to an order of the Supreme Court datedday of.....1997 and pursuant to the Real Property Act

The execution clause :

Minnie Smith by her guardian Matilda Smith acting by and with authority to transfer under order of the Supreme Court
Registered No.....
Signed: Matilda Smith in the
Presence Of:

An attested true copy of the Supreme Court order should be attached.

It is of-course axiomatic that if the purchaser is an infant the contract should be either in the name of the adult parent and nominee i.e. "Adolfus Smith and/or Nominee" or in the name of the adult and the infant "Adolfus Smith and Minnie Smith" although in the later case clause 8.6 of the contract would have to be deleted and initialled with a further condition S

"The purchaser Minnie Smith declares that she is under disability in that she is under 18 years of age but is under no other legal disability and further Adolfus Smith declares that he is over 18 years and is under no legal disability."

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RE.I.SA.