

Extinguishment of purchasers' rights – importance of priority in unregistered land systems

21 June 2019 | Contributed by [Lennox Paton](#)

Overview

Law

Extinguishment of purchasers' rights – are you protected?

The way forward

Overview

The Bahamas has an unregistered land system that is based on the conveyancing laws of England and Wales issued before 1925. Therefore, deeds and documents should be recorded in the Registry of Records in The Bahamas as soon as possible in order to:

- notify the international community as to the existence of ownership and interests in a property; and
- secure priority against the subsequent recording of any mortgage, charge or agreement in the registry which can potentially affect title to a property.

Priority becomes particularly important in high-net-worth commercial and condominium development transactions. Take, for example, an instance where a developer purchases property to develop a condominium project and records the conveyance in the registry. During the development, the developer agrees to sell units in the condominium. Several purchasers enter into agreements for sale with the developer and pay deposits, instalments and construction stage payments, but these agreements are not recorded in the registry.

The developer later enters into a loan agreement with a mortgagee (lender) to assist with the construction, development and completion of the condominium project. The mortgagee lends funds to the developer and in return, the developer mortgages the property to the mortgagee as security. The mortgagee records the mortgage in the registry subsequent to the existence of the numerous unrecorded purchase agreements that are mentioned above. The developer then defaults on the mortgage and the mortgagee seeks to exercise its power of sale remedy contained in the mortgage to recover the debt owed.

In an unregistered land system, it is important to look to priority to determine whose interests are protected.

Law

Section 23 of the Conveyancing and Law of Property Act 1909 states that a mortgagee exercising the power of sale has the power to convey the mortgaged property free from all interests and rights that the mortgage is in priority to, but subject to all interests and rights which have priority to the mortgage.

Further, Section 10 of the Registration of Records Act 1928 states that any conveyance or mortgage lodged and accepted for recording in the registry first in time has priority and will not be defeated or affected by the time or date of the execution of another document.

Extinguishment of purchasers' rights – are you protected?

The mortgagee's interest is in priority to any and all interests arising after the date of recording of the mortgage. However, notably, the mortgagee's interest also ranks in priority to, and overreaches, the interests of all pre-mortgage purchasers with unrecorded agreements regardless of the execution date of the agreements for sale. The recording date in the registry governs priority.

This means that pursuant to the Registration of Records Act, the mortgagee may sell the condominium project or units to recover the debt owed to it by the developer without regard to the

AUTHOR

[Nateisha L Anderson-Bain](#)



purchasers or the deposits, instalments and stage payments that the purchasers previously paid to the developer. In this instance, the purchasers' main recourse would be to bring an action against the developer to recover the funds that they have paid.

However, in the example above, if the purchasers' agreements were recorded in the registry before the recording of the mortgage, the mortgagee's exercise of its power of sale remedy would be subject to the purchasers' interests in the property.

Further, it should also be noted that title and priority may also be affected by:

- unpaid real property taxes, which create a first charge on the property in priority to all other encumbrances for as long as they remain due (Section 25 of the Real Property Tax Act 1969);
- actions, orders or judgments entered up in the Supreme Court (Section 63 of the Supreme Court Act 1996); and
- unpaid home-owners association fees (Law of Property and Conveyancing (Condominium) Act 1965).

The way forward

It is important to engage a competent attorney who can:

- recognise issues that may affect title; and
- identify risks involved in completing a sale or mortgage of the property.

In the event that title issues go unnoticed or are not settled or communicated in a timely manner, there is a risk of losing the property or deposits and instalments which have been paid to the developer. This may result in litigation and incur expenses in bringing or defending an action.

The Bahamian legislature has circulated several bills in order to repeal the current conveyancing laws in favour of a registered land system. These bills are presently under review and have not yet been passed into law. If the bills are eventually passed, it will take some time before all Bahamian land is registered; therefore, The Bahamas may not have a fully registered land system for quite some time.

Regardless of whether The Bahamas moves from an unregistered to a registered land system, engaging a competent attorney is vital to ensure that:

- the agreement for sale is negotiated in the purchaser's or mortgagee's best interest;
- the conveyance is drafted to ensure the proper transfer of title from one owner to the other;
- title to the property is thoroughly reviewed and approved and all issues affecting title are raised or settled before completion; and
- the purchaser's or mortgagee's deeds or documents (specifically, in a development context where the developer may seek financing) are recorded for their protection and in compliance with all applicable Bahamian rules, regulations and laws.

For further information on this topic please contact [Nateisha L Anderson-Bain](mailto:nbain@lennoxpaton.com) at Lennox Paton by telephone (+1 242 502 5000) or email (nbain@lennoxpaton.com). The Lennox Paton website can be accessed at www.lennoxpaton.com.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).