

SELLING PROPERTY

While we cannot detail all of the requirements for the sale of a property we set out below the more important issues. Most sales in New Zealand are on the standard form of Agreement for Sale & Purchase used by Real Estate Institute members and legal firms. This guide is based on the provisions of that agreement.

Please note: We can give advice on the legal aspects of the purchase but are not qualified to advise on the financial merit of the transaction.

Your specific requirements should be discussed with us.

GST

The front page of your agreement will detail whether the sale is plus or inclusive of GST. There are also obligations in the provisions of the agreement with regard to GST liability. In the event that GST is involved in your transaction, these issues should be considered prior to the signing of the agreement. If the agreement was signed before you took advice, we suggest the GST issues are considered as soon as possible as there could be obligations to return GST before settlement date.

If the sale is between two registered parties, it will be 'zero' rated and you will need to discuss this with us.

Tenancies and Vacant Possession

The front page of the agreement provides for detail of tenancies to be included. If there is no detail of tenancies included, the vendor must give vacant possession on settlement date. If there are tenants to vacate, it will be necessary to give the appropriate notice to the tenants. As the notice period is usually a minimum of 42 days, this needs to be dealt with quickly. Please advise us if you believe there could be any problems with regard to tenants or the granting of vacant possession.

If the property is owned by a Trust there may be a life occupancy interest that needs to be accounted for on sale of the property. Failure to do this may cause problems with the Inland Revenue Department. Please discuss your requirements with us.

Chattels

The last entry just above where you sign the agreement is the list of chattels in Schedule 1. These are the chattels that are included in the sale and on settlement you are required to hand these over in the same state of repair as they were at the date of the agreement (free of any debts such as time payment).

Although not strictly a chattel, trees that could be classified as a forest need to be dealt with if they are liable under the Emission Trading Scheme (ETS). Please contact us or your accountant in this regard.

Deposit

Clause 2 of the general terms of sale records that the deposit is to be paid on the signing of the agreement unless the agreement provides otherwise. The person to whom the deposit is paid (usually the Real Estate Agency) holds this deposit as a stakeholder until the agreement is unconditional and the title requisition time (ten working days) has expired. It is usually necessary for the agent to obtain authority from both the purchaser and vendor to release the deposit. In the event that the agreement becomes unconditional you should monitor the release of the deposit and if you require any assistance in this regard please advise.

If you have any concerns regarding the delay in payment of the deposit please discuss them with us as there are provisions in the agreement to protect a vendor.

Possession and settlement

Clause 3

As noted previously you are required to give vacant possession unless a tenancy is recorded.

There are a number of matters that need to be considered with regard to possession.

- Boundaries. The agreement provides that on the sale of vacant residential land, the seller must ensure that all boundary markers are in their correct positions. Please discuss with us if you foresee any problems in this regard.
- Inspection. The property must be in the same condition as inspected at the time of purchase (fair wear and tear accepted). Under the terms of the agreement you are required to give the purchaser, or the purchaser's agent, access to the property on one occasion prior to settlement to examine the condition of the property, fixtures, chattels, etc and if necessary the right to re enter and inspect any work that may have been carried out as a result of requirements following the first inspection.

Clause 7 details the rules for dealing with claims by a purchaser for compensation. After inspection, if this arises, please contact us to ensure the rules are followed.

- On settlement you are required to make available keys to all exterior doors, electronic door openers, and keys or security codes to alarms (this is not a requirement if the tenant holds these). It is essential that the keys etc are available on settlement date. If keys have been lost, replacements should be made prior to settlement. We suggest that unless there are alternative arrangements the keys etc are left at our office for delivery to the purchasers on settlement. We emphasise that the provision of keys etc is a condition of the sale and non availability will cause major difficulties on the day of sale.

- Security contracts. If your alarm is part of a security contract you may incur a liability to pay this after settlement if it is not taken over by the purchaser. This should be included as a condition of the agreement and should be discussed with us prior to signing. If this has not been done it may be possible to negotiate with the purchaser post-settlement. Please let us have you instructions if you require this.
- Settlement. The agreement provides that settlement must take place on the nominated day of sale before 4 pm. If the funds are not received by 4 pm interest at the rate detailed in the contract is payable on a day to day basis until settlement occurs. Settlement can only occur if the vendor is in a position to settle. This means that the appropriate transfer documents must be signed and available together with transferable title and the release of Mortgage documents. There is also the obligation to apportion outgoings such as rates, water rates, and provide keys etc. In the event that the vendor is unable to settle, a default occurs. A default will lead to the purchaser having certain rights against you.

Examples of these rights are;

- If you are unable to give vacant possession you will be obliged to compensate the purchaser by provision of temporary accommodation or interest calculated on the purchase price at the rate of interest shown in the agreement.
- In the event that you do not have proper title available and the purchaser elects not to take possession there is the obligation to compensate for temporary accommodation or pay the interest rate as detailed above. If the property is tenanted there is an obligation to pay the rent to the purchaser.

If there is likely to be a problem in meeting the terms of settlement it is therefore essential that you discuss the problems with our office as early as possible with a view to mitigating the likely costs of default.

- Settlement against new Title
If you are subdividing and a new title is being created there are conditions relating to settlement that should be discussed with our office.

Insurance

Clause 4

You are obliged to maintain insurance until possession is given. The purchaser is not required to take over your insurance policy and in almost every case will arrange their own insurance from possession. Following possession you have the right to cancel your insurance and seek any refund that is available from the insurance company. Please note if you are selling a Unit Title Body Corporate insurance remains in place.

Title Requisitions

Clause 5

There are a number of provisions providing rights for the purchaser to requisition problems identified with the vendor's Certificate of Title, Unit Title, or Cross Lease. The purchaser must do this within 10 working days of the date of agreement and if a requisition is received this issue will need to be discussed in detail.

Although there may be no other conditions in the agreement, the title requisition clause gives the purchaser the right to cancel the agreement and the general conditions provide that the deposit must be held until the requisition period has expired. If you have any concerns regarding this, please contact the office regarding the requisition provision.

If your property is a cross lease or unit title property and you are aware of any changes that have occurred to the buildings or of the addition of extra structures we suggest you discuss this with us as soon as possible.

Vendor warranties and undertakings

Clause 6

Please note the importance of understanding the warranties and undertakings you are providing.

The general terms of the agreement, if unaltered, record that the vendor is providing a number of warranties and undertakings. It is essential that you study these and if you believe there is any difficulty in complying please advise us immediately. The important areas are;

- a) The vendor undertakes that at the date of the agreement there has been no notice or demand from any local authority, a tenant, any other party regarding the property. The agreement goes on to state there is a further obligation to give notice of anything received between the date of the contract and settlement.
- b) The vendor undertakes that no consent or waiver has been provided in relation to any application under the Resource Management Act (eg consent to a neighbouring development).
- c) There are also undertakings given that;
 - All chattels will be delivered in the same state of repair.
 - Anything sold on the property is free of any charge (eg time payment).
 - There are no arrears of general or water rates.
 - If there is advance income (e.g. rent) that the statement provided on settlement correctly records the payment.
 - Any work to the property has been done with the appropriate Permit, Resource Consent or Building Consent and has been completed in accordance with that Permit or Consent and that a Code Compliance Certificate has been issued where relevant.

- There is also an obligation to comply with the Building Act 1991 and Building Act 2004.

Please note that the two provisions underlined above create an obligation on you as vendor (and this can include a liability for all trustees if the property is held in a trust) to comply.

We are aware of a number of claims relating to leaky buildings that have caused problems for vendors. Please consider the provision on leaky buildings set out below.

We cannot stress the importance of the clause relating to warranties, in particular, building work. Please discuss any possible problems relating to these issues with our office.

Note: there is a responsibility not to breach these warranties between the signing of the contract and settlement.

Leaky Buildings

With buildings constructed since the changes in the Building Regulations early in the 1990's there have been a number of issues regarding leaking and rot. It is essential that the condition of any building is not misrepresented to a purchaser either by yourself or any of your agents. If questions are asked regarding leaks the correct answers need to be given. There is also risk if leaks are deliberately concealed.

We also draw your attention to the obligations under the warranties to comply with the Building Act. If you are the owner of a leaky building and sell this, you may be liable even if the purchaser knew of the problem. The only way to ensure protection from claims is to negate or remove the warranties referred to. This can only be achieved if changes are made before the agreement is signed. It is important that you discuss this with us as early as possible.

If for any reason an agreement has been signed and you have concerns, while your options may be limited, we can possibly take steps to remove or reduce your liability depending on the nature of the agreement.

Unit Titles and Cross Lease Titles

Clause 8

The agreement has specific requirements regarding the sale of properties having a unit title. This relates to compliance with Body Corporate provisions and the appropriate certificates being provided by the Body Corporate. Please discuss these with our office.

Please also note you are undertaking that there are no changes to the unit plan agreed and no resolution that would alter the title having been passed.

Conditions

Clause 9

The agreement contains a provision regarding LIMs (Land Information Memorandums) the purchaser has a right to obtain the LIM if this provision has been included in the agreement. If the purchaser is not satisfied with the provisions of the LIM, notice must be given and the vendor has certain rights to resolve the matters identified as a problem. The time limits are strict and the response must be given within 5 working days. In the event that there is a problem with a LIM report contact should be made with our office immediately with a view to complying with the strict time limits.

It must be remembered with all conditions (eg finance, LIM, etc) that if a purchaser does not comply a vendor has the right to withdraw from the agreement. There will be times when the purchaser requires an extension of the time limits. No extension of the time limits should be given by a vendor to the purchaser, real estate agent, or other party without careful consideration of the provisions of the agreement. We therefore strongly suggest that you contact our office to discuss any extensions before they are given.

Conflict between clients

The Bay of Islands is a relatively small community and being the largest law firm in the area there is a possibility that your transaction may involve another of our clients. We will normally be aware of this and discuss the possibility of conflict with you. If we are not aware of this please bring it to our attention immediately.

Where there is the potential for conflict we will discuss this and in conjunction with you decide whether it is appropriate for our firm to be involved, if necessary we can refer you to an independent property Lawyer.

Payment of money from sale

We require your instructions as to how the money from the sale is to be utilised. If there are mortgages or other charges on the property these will need to be repaid (if they have not been re-secured on other property) and any rates, water or other charges covered. The balance is then available for payment on your instructions. In view of the need to clear mortgages etc it is often impossible to pay the amount on the same day, particularly if settlement occurs late in the day. We will however be able to make payment by the next business day.

We experience difficulties with Banks accepting property sale payments as cleared funds that you can use immediately. If you will need to draw on the funds immediately please advise as it may be easier to make payments directly from our trust account to avoid banking delays. Alternatively, we may be able to arrange with your Bank to have immediate release of funds. This would depend upon your Bank's policy.

Finally, by way of warning, you need to protect ownership of your funds. If the funds are to be lodged to a joint account there is a risk that these will become joint funds or relationship property (there is also a risk of gift duty being claimed by the Inland Revenue Department). Please consider your position and discuss this with us before providing instructions to pay into joint accounts as there may be ownership, property relationship or other issues that need to be resolved first.

Summary

The above information is a brief summary of the vendor's obligations under the agreement used in most land sales. We can not cover all matters and in many cases there will be additional clauses, it is therefore essential that if you have any concerns regarding the form of agreement you discuss these with the appropriate person in our firm.

We handle our property transactions within a conveyancing team headed by a Lawyer. Each Lawyer is assisted by Legal Executives who deal with the day-to-day matters. Most of your contact once the transaction is underway will be with the Legal Executive. Please do not hesitate to contact either the Legal Executive or the Lawyer handling your file at any time during the transaction.

Please note this guide covers only the important aspects of the sale process, please discuss any particular requirements you have with us.

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