

BURROWES and Company

Barristers and Solicitors

Client Newsletter

December 2009

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REAL ESTATE AGENTS ACT

The Real Estates Agents Act 2008 came into force on 17 November 2009 and is set to revolutionise the world of real estate, particularly for consumers.

Real estate agents, branch managers and salespeople (referred to as 'licensees' in the Act) are significantly affected by the Act and changes in what will have been standard practices are required in order to meet the new obligations on licensees under the Act. It appears that the Real Estate Institute of New Zealand (REINZ) has been active in preparing agents for the changes brought about by the Act and changes to standard form agreements were noticed almost immediately after the Act came into effect.

Lawyers are also affected by the changes, and are now required to play a more notable role in real estate transactions at an earlier stage than has been necessary in the past.

A good summary of the changes brought about by the Act is contained in 'Fast Forward to November 17,' (available at www.november17.co.nz)

The purpose of the new legislation is to protect the interest of consumers of real estate services and to promote public confidence in the performance of real estate agency work. This is to be achieved by the creation of the Real Estate Agents Authority, a new and

independent Crown entity set up by the Act.

According to QV, key system changes administered by the Authority will include:

- compulsory licensing for all real estate agents including minimum standards for qualifications;
- a publicly accessible register of all licensed agents so that consumers can check the validity of their agent and whether he or she has been subject to any disciplinary action in the last three years;
- a more transparent complaints process (where penalties for licensees found guilty of unsatisfactory behaviour will be upped from \$750 to as much \$100,000); and
- a compulsory Code of Professional Conduct and Client Care.

These measures all present changes to the relationships between consumers, real estate agents and legal advisors.

In the past lawyers generally did not need to look at the agency agreements between clients and their agents. Now real estate agents cannot claim commission without a signed agency agreement. This means that consumers may need to involve their lawyers earlier in the sale process.



Michael Burrowes
Principal

Burrowes and Company

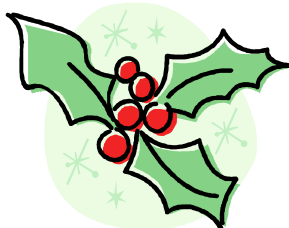
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SEASONS GREETINGS

Our offices will close at
3pm Thursday 24 December 2009
and re-open
8:30am Monday 11 January 2010.

Burrowes and Company wishes you a safe and happy festive season and all the best for the coming new year.

PURCHASE AT MORTGAGEE SALE

A mortgagee sale occurs when the Bank realises its security over a property to cover outstanding mortgage repayments. For the purchaser of that property, the considerations are quite different to that of a regular property purchase.

Owing to the forced nature of the sale, property can often be purchased at a low price (an average 16 per cent discount off the estimated market value according to analysis by PropertyIQ). Naturally, there has been increased interest in purchasing properties at mortgagee sale in recent years. Whilst the benefit of a “bargain” is obvious, the pitfalls of purchasing at mortgagee sale are perhaps not so well known. It is important that prospective purchasers take certain steps to ensure any purchase at mortgagee sale is a safe deal.

A fundamental difference between ordinary sales and mortgagee sales is that the standard REINZ agreement used in most real estate transactions is replaced by a contract containing non-negotiable terms that heavily favour the Bank. A Bank enforcing its power to sell will generally avoid guaranteeing the state of the property upon settlement or even whether the purchaser will get vacant possession. It is therefore crucial that the purchaser be extra vigilant and check on the property themselves before contracting. If research is not done, a purchaser may face a property stripped of its chattels by the former owners or the expense of getting a court order to remove a tenant who refuses to leave.

There is no recourse against the Bank if the property is “leaky” or contains unauthorized structures or

alterations. If the prospective purchase is of a unit title such as an apartment, it is paramount that the purchaser obtains a building inspection report and asks for the minutes of the last general meeting of the body corporate. This will provide clarification on whether or not the purchaser at mortgagee sale is responsible for paying exorbitant body corporate levies to cover the cost of any building repairs.

There may be claims or burdens on the property that will not be extinguished upon mortgagee sale, for example, when the previous owner has entered into a restrictive covenant with the local council not to develop a certain part of the land. All the necessary enquiries should be made to the local council to find out if a property is affected in this way.

A mortgagee sale could also be held up significantly if a spouse or partner of the mortgagor lodges a caveat to protect their rights under the Property (Relationships) Act 1976. The Bank will have to negotiate with the complainant before they can sell the property; so to prevent disappointment and delay, our advice is to find out as much as possible about the property, even if this means talking to neighbours to assess the situation.

Purchasing property at mortgagee sale can be risky but also rewarding if you know what you are doing and have done all of your homework. So to reap the rewards, uphold the maxim ‘knowledge is power’. A prospective purchaser ‘in the know’ will have the ability to make a wise and informed decision when it comes to buying property at mortgagee sale and avoid some of the potential downfalls.

PROPERTY OWNERSHIP

When buying a property it is worthwhile to consider what kind of ownership is best for your circumstances. Under the Land Transfer Act 1952 the type of ownership noted on the title will effect who will inherit your property when you die. The following is a break-down of the various types of ownership and what they may mean for you.

Co-Ownership

An estate or interest in land may be owned by several people. In New Zealand there are three principal forms that co-ownership may take — a joint tenancy, tenancy in common and co-ownership pursuant to the Joint Family Homes Act 1964.

Joint Tenancy

A joint tenancy is when an estate or interest in land is transferred to two or more transferees without any words “of severance” to show that they are to take distinct and separate shares. Each joint tenant will

have no individual right to any particular part of the land, but they are entitled to use, possess and enjoy the whole, subject to the similar right of the other joint tenant(s).

To create a joint tenancy the ‘four unities’ must be the same for all of the relevant parties – these are the interests of possession, interest, title and time. This means that no party can have exclusive possession over the property nature, extent and duration; the interest must be the same in nature, extent and duration; the parties’ interests must be derived from the same instrument of title; and finally the tenants must have gained their interests at the same time.

The significance of a joint tenancy is that when one owner dies, their interest in the property will be consumed by the other owner(s), and thus extinguished. This means that the deceased owner cannot leave

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PROPERTY OWNERSHIP

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their interest in the property to someone else through their will.

Tenancy in Common

Rather than sharing the entire estate each owner has a specific and distinct share in the property, though undivided. Consequently there is a difference in survivorship - upon the death of a tenant in common, ownership of his or her distinct share of the estate or interest passes to his or her personal representative, rather than the other tenant.

Whereas joint tenants hold equal shares or interests, tenants in common frequently hold in unequal shares. In the case of unequal contributions, the law will presume that there is a tenancy in common, and will divide the shares in accordance with the contributions.

Joint Family Homes Act 1964

The Joint Family Homes Act 1964 provides that spouses who register their family home under the Act are in effect joint owners, and cannot deal with their interest separately until one dies. They may, however, apply to have this cancelled.

Trusts

Creating a trust is another common way to purchase a

property. Trustees always hold property as joint tenants, but there are various benefits to be gained from owning a property in trust.

One is that it protects the property from subsequent claims by creditors. Where the property is the family home this will usually allow the family to retain and enjoy it even where the debtor still owes money to creditors. Note that there are a number of exceptions to this rule.

Another benefit is that where a trust is created prior to marriage the property held in the trust will not be included in the divisible matrimonial property, should the marriage be dissolved.

Regarding succession, trusts are often used as a way of protecting property for the benefit of beneficiaries, at the discretion of the trustees. This can be an effective way of providing for children who are unable to care for themselves, or who otherwise cannot be trusted not to waste the assets.

Conclusion

It is important to consider all of your options before buying a property, as decisions you make now may have lasting consequences for you, your partner or your children.

DUTIES OF TRUSTEES

The duties of a trustee need not be onerous, but a failure to carry out those duties may, in a worst case scenario, result in a claim against you by a beneficiary who has suffered a loss as a result of your actions or omissions.

For those readers who have consented to act as a trustee for a friend or family member without really understanding what that role entails - the list below, while not exhaustive, sets out some of the most important trustee duties.

The duty of efficient management

- Whether you are an original, substitute or additional trustee you must first become familiar with and abide by the terms and conditions of the Trust Deed.
- Know the extent of the assets and liabilities of the trust and make sure that these are properly held in the name of the trustees.
- Ensure that the trust is managed and administered properly and that the trustees meet to discuss and agree on issues. Do not be a rubber stamp of the settlor's wishes. Take minutes of these meetings and record all resolutions.
- Make sure that the administration costs of the

trust are kept to reasonable levels.

The duty to keep and render accounts to beneficiaries

- Make sure that a clear audit and paper trail is kept of all decisions and transactions. This will involve secure storage of the trust deed, minutes of meetings and resolutions, financial accounts, correspondence and other trust documents.
- If the beneficiaries request information, the trustees have a duty to make certain information available, such as the trust deed, financial statements and investment strategies.

The duty to act personally

- Carry out your trustee duties personally.
- You may instruct an agent to carry out your decisions but you must make your own decisions and not be dictated to by other trustees, the settlors or beneficiaries.
- Trustee resolutions must be unanimous.

The duty of loyalty

- Always act in the best interests of both

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DUTIES OF TRUSTEES

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present and future beneficiaries and be impartial between beneficiaries.

- Avoid conflicts of interest.
- Do not benefit or profit from your position as trustee unless authorised to do so.
- You must always protect the interests of the beneficiaries.

In all things, a trustee's standard of care is measured against that of an ordinary prudent business person

managing the affairs of others. Of course a higher standard is required if the trustee is a professional person such as a lawyer or accountant.

The management of trusts often come under scrutiny and all of the benefits of having a trust may be lost if the trust records and procedures do not meet the required standard. It is therefore important to keep a clear audit and paper trail and to bear the above trustee duties in mind. It is also important to insist that you, as a trustee, are kept up to date with all of the trust's affairs.

NAPIER HEIGHTS HOLDINGS LIMITED v CROWN HEALTH FINANCING AGENCY

This was an appeal by Napier Heights Holdings Limited ('NHH') from a summary judgment of the High Court for specific performance of a Sale and Purchase Agreement ('the Agreement'). NHH had purchased the old Napier Hospital property for \$20m from the Crown Health Financing Agency ('CHFA'), after mistakenly believing the land to be worth about \$31.5m. This belief was based on evidence provided by the CHFA, who produced a Valuation Memorandum of a smaller block of land across the road, valued at approximately \$750 per square metre of land.

CHFA relied on a clause in the sale and purchase agreement which stated:

"The purchaser warrants and undertakes that it has entered into this Agreement entirely in reliance on its own judgment and enquiries, and not on the basis of any warranties, undertakings, advertisements or representations made by or on behalf of the vendor, any agent of the vendor or any officer or employee of the vendor's agent."

This clause was a decisive factor in the view of the High Court, which found in favour of the CHFA. NHH appealed for the summary judgment to be set aside so the issue could go to trial.

Judgment

The question before the Court of Appeal was whether there was an arguable case for NHH – if not; the High Court's summary judgment would be upheld without a trial. The Court ultimately held that it was not appropriate to enter a summary judgment, given that the parties disputed certain facts which should be decided upon at trial. Two arguments presented by NHH were of particular concern to the Court:

1 The settlement notice given by the CHFA was

invalid as it was based on an apportionment of the purchase price that was not carried out in a manner required by the Agreement; and
2 The contract was induced by the misrepresentation in the Valuation Memorandum.

The land was divided into eight titles. NHH disputed a report obtained by CHFA from Telfer Young which apportioned 58.7% of the purchase price to the Tower Block, with the remaining 41.2% allocated between the balance land titles. NHH argued that this was not sufficient to be considered a valuation, and the CHFA had been 'valuation shopping' and not acting in good faith. Although the Court declined to make a ruling regarding the meaning of a somewhat unusual provision in the Agreement, they were clearly in favour of NHH's interpretation of 'valuation'; rejecting the CHFA's argument that all the parties intended was that the vendor allocate the purchase price based on valuation advice.

NHH also maintained that the CHFA had made false misrepresentations, some of which were known to the CHFA, with regard to the value of the property. In support of this, NHH sought to introduce evidence that allegedly proved that CHFA had received but not disclosed lower valuations before the sale. The Court allowed the application, stating that CHFA had an obligation to introduce all evidence, even where it works to their detriment, in the first-instance summary judgment application. This new evidence meant that the Court of Appeal had a different perspective to the High Court, and there was certainly an arguable case with regard to misrepresentation. If NHH could prove misrepresentation at trial the contract would be cancelled under the Contractual Remedies Act 1979 and NHH may be entitled to further relief under the Fair Trading Act 1986.

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