Evans Bailey
LAWYERS

NEWSLETTER

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INSIDE THIS EDITION

First home buyers – The process of buying and what to look out for

If you have never bought a property before, it can be an intimidating prospect. We have broken down this process below and highlighted some things you may want to keep an eye out for along the way.

The process can be split into about eight general stages (order may vary slightly).

1. Finding a house

You can seek out houses either through a real estate agency or by a private treaty between the home owner and yourself.

2. Get a lawyer

You will need to have a lawyer or conveyancing professional acting for you in order to complete the purchase. They will be able to advise you of each step and aid you with the documents required along the way.

3. Arranging finance

You will need to be completely satisfied that you will have sufficient finance available to you prior to making a sale and purchase agreement ("SPA") unconditional. Ideally, you can do a lot of the ground work for your finance before you even find a house to buy.

If you are getting a loan you will need confirmation from your bank that your application for this lending has been approved, which you can get while you house hunt. You can also complete your initial Kiwisaver forms to start the process of receiving your Kiwisaver first home withdrawal and home start grants before you sign. These forms can be downloaded online.

4. Receiving the SPA

Once you have found a house and contacted the agent or vendor about making an offer, generally the agent will prepare a SPA. We strongly suggest that prior to signing a SPA you send a copy to your lawyer to review. If you cannot arrange for your lawyer to review it prior to signing, we suggest at least asking your lawyer to provide a "solicitor's approval clause" to include in the SPA. This allows your lawyer time to review all aspects of the SPA after you have signed and during the conditional period. This is discussed further in paragraph 5.

Many buyers can feel pressured to sign a SPA straight away to ensure they don't lose out on a purchase. However, we often receive SPAs already signed and discover that without advice, the buyers are locked into terms and conditions that are entirely unfavourable for them.

5. Conditional Period
If your SPA has no conditions included when you sign it, then it is unconditional upon signing. Once the SPA is unconditional, it generally cannot be cancelled.

If your Agreement is "conditional" you will have a specified amount of time to perform the recorded investigations into the property such as a building report, LIM report, methamphetamine testing and arranging finance.

By the end of the specified time period for each condition, your lawyer will need to advise the vendor's lawyer (on your behalf) that the relevant condition is or is not satisfied. Once both parties have satisfied the relevant conditions, the agreement will be declared unconditional.

6. Deposit
Once unconditional, you will be required to pay the deposit (if any) for the property. If you do not pay the deposit, the Vendor can provide three working days' notice of requiring payment. If it is still unpaid, and sufficient notice has been issued to you by the vendor, the vendor is entitled to cancel the agreement.

7. Settlement preparation
Once unconditional, your lawyer will begin preparing the relevant documents for you to sign prior to the settlement date and will liaise with your Kiwisaver (if applicable) and lending parties to prepare for settlement. You will also need to arrange insurance.

8. Pre-inspection

Up to one day prior to the settlement date of the property, you are entitled to arrange with the agent or privately, a pre-inspection of the property. If, as a result of your pre-purchase inspection, you identify damage arising since the agreement, your lawyer can, prior to settlement, raise the issues with the Vendor to negotiate to have these issues remedied, the settlement price reduced or both.

9. Settlement day

On the settlement day your lawyer will complete the transfer of the property to you once all the funds have been received and paid out to the vendor. The lawyers will then advise the agent or vendor that the house keys can now be released so you can move in.

The key to buying any home is being prepared. Ask for help. Talk to your lawyer early, and ensure you have your required IDs and finance ready to go.

Rural Leases

A rural lease ("lease") is a legally binding document which governs the relationship between the landlord and the tenant for the use of rural land.

Often rural leases are entered into as a gentleman's agreement with a handshake to seal the deal. This works fine until something goes wrong and/or there is a disagreement between the landlord and the tenant. It is always best to discuss and put in place a written lease when both parties are on good terms rather than in the middle of a dispute.

Leases can be beneficial to both the landlord and the tenant. The landlord benefits by receiving regular payments for the use of their land; maintains the capital gains during the length of the lease; and if the farmer was considering selling because of retirement, possibly leasing is an alternative which creates income and the farmer continues to own the land. With the cost of land becoming prohibitive, for many young farmers, leasing provides the opportunity to build an asset base without the initial cost of land purchase.

The terms of the lease, the area which is to be leased, and the rent amount are minimum requirements required to be stated in a lease. Other terms can be drafted in to reflect the unique situation between the parties.

Some terms which are worth thinking about are permitted use; Landlord pays for? Tenant pays for? Rent review; Subletting; and Cropping.

Permitted use

Does the landowner want only certain farming activities to take place and not others? Different activities could affect the soil quality for future use. Are animals allowed on the land? If so, which ones? Etc.

Landlord pays for? Tenant pays for?

It is good to specify in the lease who is paying for what, such as the electricity, rates, water charges, insurances etc. With farmland, it is worth thinking about discussing, and possibly drafting into the lease; who is in charge of the weed control, fence repair, gate repair, fertilizer etc.?

Rent Review

This can be an area where disagreements occur quite frequently between the landlord and the tenant. The lease can include when and how the rent reviews will be handled and the right to renewal. Having this set out in the lease from the beginning will allow the landlord and the tenant to avoid disagreements and maintain a good relationship.

Subletting

It is common to require the tenant to obtain the landlord's consent prior to subletting the property. Or the landlord may not want the tenant to sublet the property at any time. This will need to be discussed and agreed upon while parties are drafting the lease and on good terms.

Cropping

Are there any restrictions as to what type of crop the land is used for? At the expiry of the lease, in what state does the tenant have to return the land to the landlord? Does the grass have to be a certain length, etc.?

Leases should not be entered into lightly as landlords are likely to be dealing with their biggest asset, land. There should be careful consideration and thought to make sure that the asset is protected during the duration of the lease and will be returned in an acceptable state after the lease expires.

We strongly advise that legal advice should be sought, prior to signing the lease, whether you are the landlord or the tenant. This is to make sure that the lease is a reflection of what both parties require to make this venture beneficial, what is expected of both parties, and when, and what the land can be used for.

How to give Notice to Your Tenant and What You can do if a Tenant is No Longer Paying Rent

How to give Notice to Your Tenant

There are two types of tenancy agreements which a landlord and tenant can enter into: periodic tenancy and fixed term tenancy. Periodic tenancy has no fixed end date, while a fixed term tenancy has a specified end date.

To end a periodic tenancy, a landlord must give a minimum of 90 days' notice. The law requires that the notice:

a) must be in writing;
b) give the address of the tenancy;
c) give the date the tenancy is to end; and
d) be signed by the person who is giving notice.

A landlord can give a tenant on a periodic tenancy, a 42 days' notice period, if the property is:

e) being sold and the purchasers want vacant possession; or
f) if the owner or a member of the owner's family is going to be moving into the property; or
g) if the property is used as employee accommodation and is needed again for this purpose (this would also have to have been stated in the tenancy agreement).

This 42 days' notice must meet all the requirements of a 90 days' notice and also state the reason the notice is being given (this must be one of the reasons above). If the reason is found to be untrue or not followed through, the tenant can challenge the notice in the Tenancy Tribunal.

Notice can be given to your tenant any day of the week and the tenancy end date can be any day of the week.

To end a fixed term tenancy, you are required to wait until the specified end date on the tenancy agreement. When the fixed term ends, the tenancy is then a periodic tenancy. At this point you can give your tenant a 90 days' notice.

What to do if Your Tenant is No Longer Paying Rent

Unpaid and late payment of rent is a breach of the tenancy agreement and the Residential Tenancies Act 1986 ("the Act").

It is always best to first contact the tenant, and notify them that a rent payment has been missed. The tenant may not be aware that a payment was missed and make the missed payment once notified.

If the tenant is not able to pay the rent owing in one lump sum, you can consider a payment plan that will allow the tenant to pay the rent arrears in smaller amounts on top of their regular rent payment. It is always a good idea to follow up the agreement in writing. You can formalise this agreement through a service provided by the Tenancy Services called FastTrack Resolution. This process is made up of three steps: Reach an agreement; Let the tenant know you are applying for FastTrack; and Submit the FastTrack Agreement.

1. Reach an agreement – The agreement must have the debt amount, details of the repayment plan, the date payments are to be made, and the consequences if payments are missed while the debt is being repaid.

2. Let the tenant know you are applying for FastTrack – Obtain a current phone number for the tenant and let them know that a mediator will be contacting them to confirm the details of the FastTrack Resolution agreement.

3. Submit the FastTrack Agreement online through the FastTrack application – This can be completed through the FastTrack section of the Tenancy Tribunal application. The filing fee is currently $20.44.

If a repayment plan cannot be agreed upon or the tenant is continuing to miss rent payments, a 14 Day Notice to Remedy can be issued to the tenant. The 14 Day Notice to Remedy is required to:

a) be in writing;
b) be addressed to the tenant with the tenancy address;
c) state how much the rent is in arrears and that this is a breach of the tenancy agreement and the Act;
d) state how much and when the last rent payment was received;
e) state an amount and when the amount is required to be paid by (must be at least 14 calendar days);
f) provide your contact details; and
g) explain that if the amount requested is not received by the date stated you will apply to the Tenancy Tribunal to end the tenancy and for the tenant to pay all rent owed.

The Tenancy Tribunal is available if you and your tenant are not able to reach an agreement. The referee will make a ruling that is legally binding.

Wills – What does having a Will mean and what happens when people die without one

A will is a legal document that lets you decide how you want your property, care for you dependants (partner, children etc.) and your body to be dealt with after you die. A will only comes into effect once you die and is arguably the most important document you will ever sign.

A well drafted will can reduce emotional and financial strain for your loved ones after you pass away and it reduces the likelihood of family members disputing over your estate and challenging your will. Accordingly, we suggest seeking legal advice when creating a will to ensure your intentions are accurately recorded with no room for ambiguity. If your circumstances or wishes change, you can redraft your entire will or create a codicil which is a separate binding document, read together with your will.

Generally, a will includes (among other things):

- Your requested funeral arrangements;
- The appointment of trusted members of your family, close friends or professionals to administer your estate (known as executors of your estate);
- The appointment of guardians for young children;
- Provision for your dependants such as your children, grandchildren or partner (who are also known as your beneficiaries). If your will does not adequately provide for your dependants, they could make a claim against your estate;
- Who you would like to inherit your personal belongings and your general assets such as furniture and appliances;

- Debts owing to be repaid or loans provided by you to be forgiven; and
- Specific gifts to individuals or donations to charities.

Regardless of how much property you have, you should have a will. For example, you may have an item of jewellery that you would like to give to a specific family member due to its sentimental value rather than monetary value.

It is particularly important for those who marry, enter a civil union, or de facto relationship, or have children to create a will. If you get married or enter a civil union, provisions of any will made before that are automatically revoked unless the will specifically states that it is made in contemplation of marriage/civil union. This is different for de facto relationships. If you enter into a de facto relationship, any will made before that remains valid.

If your relationship ends, you should review your will to ensure that any specific provisions for the benefit of your ex-partner, are removed before any relationship settlements are made. If you get divorced, any provisions made for your ex-partner are automatically revoked. The provisions are not revoked if you have merely separated.

Dying without a will is also known as dying 'intestate'. This means that the Administration Act 1969 determines how your property is distributed (provided that the value of your estate is above $15,000) which may not align with your wishes and may result in disputes over your estate. Generally, the property is distributed to a surviving spouse and family members in specified proportions. This process can be more time consuming, costly and complicated than having a valid will.

A will allows you to appoint trusted personal representatives to administer your estate as executors. Where there is no will, the court appoints your personal representatives such as your family member or lawyer. They are described as administrators of your estate. The person who benefits most from the estate is entitled to apply to be administrator. However, if that person does not wish to be the administrator, others can be appointed by the High Court. Your administrators can still administer your estate if you die intestate, but they will be restricted by the Administration Act 1969. If there are no family members to distribute the estate to, it then goes to the Government.

Everybody should draft a will at some stage during their lifetime to protect their loved ones and ensure that property is dealt with in accordance with their wishes. Accordingly, we strongly recommend seeking legal advice and creating a will, sooner rather than later, and ensure that if your circumstances have changed, you review your will.

Snippets

Unpaid Rates lead to Sale of Property

Whether you are purchasing your first home, family home, rental property, commercial property, retirement home, or simply refinancing your property, you may not remember as time goes by, the consequences of not keeping your rates paid and up to date with your local Councils.

When signing that all important mortgage enabling your loan funds to be available on your settlement or refinance date, you have agreed to keep the rates on your property paid up to date at all times.

Consequences of falling behind in your payments may lead to the Council informing your Bank under Section 62 Rating Powers Act 2002. Council can accept payment of the rates and arrears directly from your Bank. This payment will then be treated as an addition to your mortgage until the unpaid rates have been paid. For serious arrears, the consequence can be a Rating or Mortgagee sale of your property.

When You may have to Pay Tax selling a Property

When the bright-line test commenced, it affected residential land bought and sold from 1 October 2015. If you sold the property within a two-year period, then depending upon your circumstances residential land tax may have applied.

From 29 March 2018, the two-year period has increased to five years.

Tax may become payable if you have bought property with the intention to re-sell it and the tax paid would be based on any profit you make when it is sold.

Although the bright-line test may not apply when selling the property after the five year period has lapsed, tax may still be payable if the intention test is applied.

Residential land withholding tax will apply to the sale of your property if it is residential land, sold within five years from 29 March 2018, or you are an person buying from offshore. For more details refer to:

https://www.ird.govt.nz/property/brightline-qa.html

If you have any questions about the newsletter items, please contact us, we are here to help.