



Buying off the Plans

Has its rewards

Recent trends towards apartment living has seen a significant increase in building consents issued for apartments or multi-unit developments. With many buyers now purchasing apartments or units off the plans, we discuss below how a buyer can be protected in order to obtain the best possible outcome.

Multi-unit developments provide developers with good opportunities to maximise profits on any given piece of land. As a result this type of development is becoming an increasing part of the New Zealand landscape.

Before approval is given for construction funding, a lender may require a developer to achieve a certain level of sales, ie: a demonstrable commitment from the marketplace. It is, therefore, commonplace for multi-unit developments to be marketed on the basis of plans and artists' impressions of the proposed building. Buying property on such an intangible basis has both potential benefits and serious risks. We are all familiar with stories of buyers suing developers only to discover that the development was carried out by a company which, shortly after construction was completed, is then placed into receivership. Accordingly it is important for a buyer to protect their rights at the point the agreement is signed, rather than at any time later.

Agreement often unique

The standard Auckland District Law Society agreement for sale and purchase has been developed over the years to strike a fair balance between the rights of a buyer and those of a seller. However, because of the unique nature of a sale from plans, developers are more likely to prepare their own sale and purchase agreement.

Buyers need to be particularly alert as the inherent balance that is in the standard agreement will not necessarily be present in a developer's own agreement. Each agreement must be carefully reviewed because of its uniqueness.

Some developers will provide certain levels of comfort for buyers in an agreement; others will try to weight the agreement in their



favour. It is not uncommon for buyers to fall prey to clever salespeople, or be seduced by a view or upmarket specifications, and overlook any pitfalls in an agreement before signing on the dotted line.

Control retained by developers

Developers will often ensure that they retain control over the construction until at least the point of settlement (and sometimes for a period afterwards).

Selling from plans can take place at specific stages of a development. Initially a developer may not have resource consent for the development and needs to test the marketplace to ensure finance can be obtained before proceeding with an application for consent. As the developer may be anxious to achieve some initial sales there may be more inclination to accept a lower offer than later on in a development. A development's last few units are often sold at a higher price as the market may have moved up during the planning and construction phase, and the developer may have moved past the break even point.

However, those who buy in the early stages will have the longest wait until settlement, and also the most uncertainty. Often the first few agreements on a particular development will be conditional on such things as the developer obtaining finance and resource consent. Therefore, if buying at this early stage a purchaser must be prepared to commit to the purchase and pay a deposit even though the development ultimately may not proceed.

In this situation an agreement should include a 'sunset clause' enabling either party to cancel if the unit being purchased is not completed by a certain date. If a unit is being sold prior to resource consent being granted, most developers will include a provision where the buyer is deemed to accept the vendor's title. Therefore, if, as a condition of resource consent, a developer is required to place a charge or use restriction (encumbrance) on a title, the buyer will be unable to avoid the contract, despite not knowing of such encumbrances at the time the contract was signed.

Deposit

Most agreements require a deposit to be paid. If the developer is placed in liquidation prior to completion it is unlikely the deposit would be recoverable, unless the agreement provided for the deposit to be held by a third party stakeholder. There is also the question of who should be credited with the interest earned on a deposit.

Body corporate

Most multi-unit developments have unit titles issued. Each owner has a separate title for their unit, but is also deemed to be a member of a body corporate which not only owns and is responsible for common areas, but is also responsible for the general management of the complex. A body corporate can sue and be sued, and the members must contribute towards any of its liabilities. Owners must contribute to a body corporate to defray its costs and they must abide by its rules.

Standard rules for a body corporate are prescribed by statute, however these can be amended. A developer, while owning all of the land, may write specific body corporate rules and provide in the agreement that a buyer will simply accept whatever body corporate rules are in existence at settlement.

Another recent trend is for agreements to provide that the buyer give a proxy to the developer for 6-12 months following settlement so the developer can retain control of the body corporate for that period.

Due diligence

Whether or not a particular development 'works' once completed will have little to

do with the original artist's impression or any sales talk. Whether the buyer plans to occupy a unit or is speculating, the outcome will be more positive if due diligence is done. Common complaints in multi-unit developments include noise and management of the development. Investigating the extent of noise reduction and the body corporate rules can be a stitch in time which saves nine.

Buyers should investigate expected sunlight and views, and the general aesthetics of the development. It is also worthwhile researching and viewing the developer's previous projects to determine what issues may have arisen.

Post settlement

Settlement will typically occur on the latter of three events: title issuing, practical completion being achieved and the final code compliance certificate being issued by the local authority.

The question of practical completion can be uncertain. An agreement will typically provide that practical completion will be decided by the developer's architect. Care should be taken to consider what maintenance and/or repair periods are provided for in the agreement so when a buyer takes possession, there is still an opportunity to have any defects remedied.

Conclusion

Buying a property 'off the plans' can be a complicated transaction and may involve significant expenditure and consequent risk. A buyer should ensure:

- The agreement being used is carefully examined by their lawyer
- A sunset clause is included in that agreement
- Appropriate due diligence is undertaken
- The deposit can be funded for the duration of construction, and it is clear where and by which stakeholder it is being held, and
- Adequate and enforceable maintenance provisions are imposed on the developer post-settlement.

Buying off the plans can be exciting. However a buyer will only come out positively if they carefully and diligently go about the purchase in a thorough manner.

The Consumer Guarantees Act

It's the putting right that counts

The new car squeaks, the new fridge rattles and the plumber has destroyed the dishwasher. Problems with consumer goods and services crop up every day – so how can we get them fixed? This article gives an overview on the remedies that are available to help consumers put things right.



The rights of consumers are protected by the Consumer Guarantees Act 1993. This legislation applies to goods and services supplied by retailers and professionals such as painters, bankers and doctors, and cover everything that can be ordinarily purchased for domestic, personal or household use. Not covered are private sales, nor goods sold at auction or tender, but it does include goods sold in second hand shops and sales.

Our initial advice is to recommend keeping receipts for every purchase – including supermarket dockets. If you cannot provide proof of purchase, your chances of getting some reparation are much reduced.

Start putting it right

When a consumer is dissatisfied with the goods or services provided they should first approach the retailer or professional who sold them the goods or carried out the service. It is to the advantage of both parties to take this opportunity for an early and inexpensive resolution of a complaint.

The supplier has the right to remedy the fault themselves, generally by replacement, repair, or, in some cases, refund (if the supplier cannot be reasonably expected to repair the goods).

.Another form of remedy is to seek compensation for the reduction of value in the goods due to the defect. This option is available when the defect is of a 'substantial character' or is unable to be remedied. This generally means that the goods are unfit for the purpose for which they were purchased and/or so defective that a reasonable purchaser would not have bought the goods had they known of the defect. An example often used in these circumstances involves second-hand vehicles with wound back odometers. In addition, if the defect is substantial, the consumer has the right to reject the goods outright.

Next steps

If the problem with the goods or services is not resolved with the retailer direct, there are a number of steps to take to attempt to get satisfaction. Before going any further you should:

- Make sure you have all the facts correct on dates, who said what, etc
- Write out the sequence of events from start to finish. Ensure you have copies of all documentation and photographs, if appropriate, and

- Decide what remedy you want. This might be repair of faulty goods, a letter of apology or some compensation. Once you have all this together, an approach should be made again to the retailer or professional to try and fix the problem. Present your case politely and reasonably. Give them the opportunity to respond within an agreed timeframe. If there is still no satisfaction, you may need to talk to their manager or someone at their head office. It should be possible to fix the majority of issues in this way.

Talk with industry bodies

If the situation is still not resolved, the next step is to talk with industry bodies. Trades people, retailers and the service sector have professional associations which can help consumers. These include the Retailers Federation, Master Builders Federation, the Real Estate Institute of New Zealand, the Banking Ombudsman and many others.

However these bodies do not offer compensation, costs or damages. If you want this type of remedy you may want to take legal action – either in court or in the Disputes Tribunal.

Taking legal action

The Disputes Tribunal can hear claims for up to \$7,500 or up to \$12,000 if the other side agrees. It is inexpensive, informal and generally very effective.

If the compensation, costs or damages are over those sum/s dealt with in the Disputes Tribunal, it is time to talk with us.

Conclusion

This article is a brief overview on consumer remedies. If you are not satisfied with goods and/or services, following the steps above will help you get things put right. If further advice is needed or it looks as though court action may loom, please do not hesitate to contact us.

Leasing a Dairy Farm

Dealing with Fonterra shares

If you own a dairy farm supplying Fonterra and wish to lease it, or if you intend to lease a dairy farm, then it is essential that there be agreement between the farm owner and lessee as to the method of dealing with the Fonterra shares. We discuss below some important issues that need to be considered by both sides in the transaction.

Fonterra requires that the supplier (in this case the lessee) is the shareholder in the company. This means that the farm owner must transfer their shares to the lessee at the commencement of the lease term. In rare cases it may be possible for a lessee to actually purchase the shares, in which case the lease should have a provision for the farm owner to buy the shares back at the termination of the lease.

The valuation method for the shares and the number of shares would have to be fixed; the most likely value being that determined by Fonterra for the new season. However, there are significant risks for both parties in this arrangement due to fluctuating share values and changes in the share structure.

Transfer on trust

It is common practice to include a provision in the lease that the shares are transferred to the lessee upon trust, and returned to the lessor at the end of the lease term. A further customary provision is for any shares that arise from an increase in production during the term of the lease become the property of the lessee. It is therefore essential to identify in the lease the exact number of shares that are included in the lease to provide the basis for a calculation of the apportionment of the shares between the lessor and the lessee. It is also important to clarify whether the farm owner is entitled to take security over the shares.

Loss in production provisions

If there is a loss in production caused by mismanagement by the lessee then the lessee covenants should be sufficient to protect the farm owner. The position is more difficult if there is a reduction in supply which may arise through no fault of the lessee such as, for example, adverse weather conditions during the season.

In those circumstances, if the farm owner claims payment for the resumed shares then the lessee will be obliged to pay for new shares arising from an increase in production in the following season. Whilst the lessee may receive the benefit of the value of those shares when the lease expires, the cost of purchase may cause financial hardship in the short term.

Avoiding disputes

In discussion with Fonterra, the company emphasises that in order to avoid disputes it is essential that the rights of the parties are clearly defined in the lease. Lessors and lessees should obtain legal advice as to the exact terms of the trust in respect of the shares.

For lessors there must be provision not only to have authority to obtain information from Fonterra relating to the shares but also to have a Power of Attorney in a lessor's favour to receive a transfer of the shares at the termination of the lease.

Lessees should take care to establish rights for the shares in the case of a reduction or increase of supply.

There are various other provisions that apply to the standard trust. These may

vary according to any changes in the Fonterra share standard and the possibility of change should be recognised in the documentation.

In the case of longer term leases and Fonterra's changes in share structure, the calculation for the number of shares to be returned to the farm owner and number of shares to be retained by the outgoing lessee can be complex and disputes may arise.

Therefore the lease should include a provision for either mediation or the appointment of an independent arbitrator. Mediation can be time consuming and expensive but in view of the substantial amounts of money involved in the value of the shares, it may be justified in the case of the larger dairy farms. For smaller units the appointment of an independent farm consultant to apportion the shareholding between lessor and lessee should be sufficient.

In conclusion, this article draws attention to the need to include special conditions in dairy farm leases where Fonterra is being supplied. We hope that this article illustrates the need for legal advice and guidance to be obtained before the lease is completed.



Parenting Hearings Programme

Dealing with difficult childcare cases

No one wants to end up in the Family Court regarding issues about their children. Nor does anyone want to end up in a brawl at the Family Court out of sheer frustration due to long time delays in getting to a hearing. Never fear, Judge Boshier is here!

Judge Boshier is New Zealand's Principal Family Court Judge. In November 2006 he launched a two year pilot scheme – Parenting Hearings Programme (PHP) – in Family Courts at Auckland, Tauranga, Rotorua, Palmerston North, Wellington and Dunedin.

The PHP is based on a successfully trialled Australian model which became law in July 2006.

This new process is all about thinking like a parent and putting children's needs first. It should make parents understand more fully the damaging effects on children of bitter separation disputes and lengthy court battles.

The aim of the PHP is to speed up the time it takes to deal with difficult childcare cases in court which should, in turn, significantly reduce the damage that lengthy court battles do to the co-parenting and parent-child relationship.

Likely cases

The likely cases directed to the PHP are:

- Intractable cases where parents cannot reach any decision regarding their child/children's care (despite perhaps counselling and mediation) and which need to be resolved without delay, and
- Where a parent obtains Urgent Interim Order/s without the other parent's knowledge. The PHP urgently steps in to hear from the other parent with a view to resolving matters quickly.

Before going into a hearing, both parties are required to watch a DVD about the PHP which sets out its objectives and explains the process.

The hearing

Practically, PHP requires parties to be far more involved in the court process. This gives parties the opportunity to:

- Speak directly with the judge
- Answer questions from the judge
- Assist the court with focusing on the key issues
- Provide the court with choices on ways to resolve matters, and to be
- Involved with the decision making process.

The judge focuses on the children and the parties' relationship with them as parents. The judge's role is to decide what is in the children's best interests. This is of utmost importance to the court.



When parents go to court over their children, it is usually the children who are often the biggest losers. The longer the court battle goes on the more frustration and anger there is for the family. It is painful for children to watch their parents in this way and can cause long-term harm in their relationships with their parents. The PHP is a way forward to reduce the time that parties spend in court and attempt to lessen the damage and effect that long drawn out proceedings can cause.

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Welsh McCarthy – Hawera
Wilkinson Adams – Dunedin
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Postscript

Why you shouldn't worry too much about KiwiSaver funds being locked in

With KiwiSaver, funds are generally locked in until the age of entitlement for NZ Superannuation (currently this is 65). Some people are concerned about this, but this should not be a major issue for the following reasons:

- The government has provided some generous incentives (all of which are subject to certain conditions) including:
 - A \$1,000 kick-start to your savings account
 - A matching contribution of up to \$1,042.86 per year paid directly into your account
 - \$40 per year to offset the investment management fees (which are already discounted)
 - Subject to legislative approval, employers must also contribute into your account (starting at a minimum of 1% in April 2008, rising to 4% by 2011)
 - Tax incentives, and
 - After five years, you may be able to get assistance with buying your first house.
- KiwiSaver does not need to be the sole means of saving. We would encourage readers to also save into another fund or cash account where funds can be accessed funds if needed.
- If you tend to spend all of your income (like most Kiwis!) it may actually be a good thing that these funds cannot be touched.
- The incredible power of compounding returns. For example, an individual earning \$45,000 gross who began contributing just 4% per annum of their salary at age 35 would have over \$220,000 saved by the time they turned 65 and more than \$310,000 if they contributed 8% per annum.¹

Can New Zealanders afford not to consider KiwiSaver? If you or your family members are interested in discussing whether KiwiSaver is right for you, please call us and we will put you in touch with an expert PortfolioGroup adviser, who can help you make the best choice for your future.

Source: Strategi Ltd

¹ The calculation assumes that pay increases at 3.5% per year and contributions increase in line with pay rates, all contributions will grow at 2.5% after tax (33%) and inflation of 2% per year and no contributions holidays are taken.

IRD/GST online registration with Companies Office incorporation

Until recently commencement of business with a new company required incorporation at the Companies Office, followed by submission of the Certificate of Incorporation in an application for an IRD number. This was sent by post. Business people then had to apply to the Inland Revenue Department for GST registration.

This process can now take place within minutes as a result of changes to Companies Office and Inland Revenue procedures. Businesses can now receive their company IRD number and GST registration online, within minutes of registering their company at the Companies Office website.

In a recent World Bank survey New Zealand was rated the second easiest place in the world in which to do business, and the third easiest place (after Canada and Australia) in which to set up a business. This recent innovation is part of the Minister of Commerce's aim of achieving number one ranking in both indexes.

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