

Welcome to the Autumn issue of *Property Speaking*. We hope you find the articles of interest. If you would like to talk further about any of the items covered in this newsletter, then please don't hesitate to contact us.

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Real Estate Agents Act 2008

Obligation to provide specific information to sellers

Tenants in Common versus Joint Tenancy

What is the difference?

Property Briefs

New retirement visas and changes to investor visas for 'overseas persons' –
New unit titles legislation

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Real Estate Agents Act 2008

Obligation to provide specific information to sellers

The Real Estate Agents Act 2008 came into effect on 17 November 2009. The purpose of this legislation is to promote and protect the interests of consumers in real estate transactions, and to promote public confidence and transparency in the performance of real estate agency work. One aspect of Act is to increase the obligation on real estate agents to provide specific information to you when you are selling or leasing a property or business.

Real estate agency agreements

Before entering into a real estate agency agreement the agent must provide you with a copy of the Real Estate Institute of New Zealand's 'approved' guide, and you must sign an acknowledgment that this has been done.

The agent must also ensure the agreement explains when their commission is payable, how it will be calculated and an estimate of the amount the commission is likely to be. The agreement must also state how the property will be marketed and advertised, and the likely costs of these activities. (You are not obliged to agree to these additional expenses.)

The agent must also ensure you are aware that you can seek legal, technical or other advice and information before signing the agreement; the agent must allow you a reasonable timeframe to do this.

To be reimbursed any expenses from you, the agent is only entitled to this if the agreement identifies the source of all rebates, discounts or commission that the agent can receive in respect of those expenses. The agreement estimates the amount of those rebates, discounts or commission.

Once the agreement is signed by both parties, the agent must give you a copy within 48 hours. It is only after the agreement has been signed that the agent you have engaged is entitled to be paid a commission or reimbursed any expenses.

Cancelling an agency agreement

If you sign a sole agency agreement, the agreement may be cancelled in writing to the agent before 5pm on the first working day after a copy of the agreement is given to you. However, the cancellation will not be effective if the agent has undertaken work in accordance with the agreement before the cancellation, and that work leads to the sale of your property.

Otherwise, you may cancel a sole agency at any time 90 days after the agreement is signed. This applies even if the sole agency agreement is for a term longer than 90 days.

Agent acquiring your property or business

A real estate agent may not directly, or indirectly, acquire the property or business that you are selling without your formal consent. Consent is also required when an agent is carrying out agency work for you when that agent knows, or should know, that the transaction could result in a person related to them acquiring the property or business.

As part of the consent process, the agent must obtain, at their own expense, an independent valuation of the property or business. Your consent must be obtained after you have been given the independent valuation, and it must be given to you in a specific form.

However, you can give provisional consent before you receive the independent valuation; that consent will be based on the agent's provisional valuation for the property or business. If the actual valuation is greater than the agent's provisional valuation, your provisional consent can be revoked.

If a sale agreement is signed that breaches either of these two obligations (the acquisition by an agent of the property or business that you are selling, or the agent carrying out agency work when a person related to the agent acquires the property or business) you are not liable to pay any commission regardless of whether you cancel the sale agreement or not.

This new legislation has been greeted with enthusiasm by consumers. We welcome the new transparency and accountability that it brings to real estate transactions.

Tenants in Common versus Joint Tenancy

What is the difference?

When buying property it is important to consider the type of ownership that is appropriate for your particular circumstances. If your property is being bought by more than one person, then Joint Tenancy and Tenancy in Common are the two principal types of ownership choices. But what is the difference?

Joint tenancy

Joint tenancy arises when two or more people are buying a property and the shares are undivided and neither person owns a defined share. This is the most common form of ownership for a husband and wife purchasing a property which will be owned equally. There are no shares shown on the title; therefore if the property is transferred to 'Thomas Smith and Elizabeth Brown' without any reference to shares, they are joint tenants.

In the case of a trust buying a property, the trustees must hold the property as joint tenants.

The characteristics of joint tenancy are:

- » On the death of one of the owners the other owner/owners automatically become entitled to all of the property. This will happen regardless of any provision the deceased has made for the property in their Will
- » An owner can mortgage their interest without the agreement of the other owner. However, this would be unusual in practice, as most lenders would require both owners to sign mortgage documentation to protect their security.
- » There are circumstances where a joint tenancy can be changed to tenants in common. This may be necessary in the event of bankruptcy of one owner or the breakdown of a relationship.

Tenants in common

This type of tenure allows people to own a property jointly, but in equal or unequal shares such as 'Thomas Smith as to an undivided 1/3 share and Elizabeth Brown as to an undivided 2/3 share'.

Tenants in common is often used when the buyers are in a de facto relationship, are business partners, friends or are family members buying a property together.

The advantage of tenants in common is that a buyer can leave their share in the property under their Will to another person of their choice. Being tenants in common also enables the buyers to have their share recorded on the title to the property based on their financial contribution to the purchase of the property.

The characteristics of tenants in common are:

- » Any of the owners can transfer or mortgage their share without the knowledge of the other owner/s, and
- » If one of the owners dies their share will pass automatically to whomever the deceased owner has provided for in their Will.

If you decide to buy a property as tenants in common, it is important for each owner to have a Will in place. Your Will should name who you want your share in the property to transfer upon your death.

Couples (married, de facto or civil union) buying a property together should consider very carefully the implications of what type of ownership they require and also the effects under the Property (Relationships) Act 1976 (PRA). It may be appropriate to enter into a contracting out agreement under the provisions of the PRA or a property sharing agreement to avoid disputes and clarify both parties' intentions. A property sharing agreement may also state who pays for the outgoings and maintenance, and what is to happen on the sale of the property or if one owner wishes to sell their share in the property.

Conclusion

Deciding on which form of ownership you should choose depends on your personal circumstances. Confusion often arises about the differences between tenants in common and joint tenancy. It is important that you understand the differences and that you obtain the best professional advice when buying a property together.

Property Briefs

New retirement visas and changes to investor visas for 'overseas persons'

Overseas persons requiring visitor visas to enter New Zealand now have two new retirement visas available to them. Additionally, the two investor visa categories have also been amended. The new changes to the immigration visas took effect on 29 March 2010.

The retirement visas allow applicants to obtain a two year visitor visa under a 'temporary retirement' category or permanent residence under a 'parent retirement' category. The applicant must show that they can satisfy the minimum investment requirements for each visa. The retirement visas supplement last year's changes to investor visas that grant residence to applicants willing to invest between \$1.5-\$10 million in qualifying 'acceptable investments' as set out in government policy.

These changes may assist overseas persons in purchasing land that is considered sensitive for the purposes of the Overseas Investment Act (OIA). A person will not require consent under the OIA if they can establish that they are 'ordinarily resident' in New Zealand. 'Ordinarily resident' means that they hold a residence permit (including one granted under the parent retirement or investor categories) **and** are either domiciled in New Zealand or have been physically present in New Zealand for 183 days in the 12 months preceding the date that the overseas person buys land that would otherwise require consent under the OIA.

There is also scope under the temporary retirement category for overseas persons to satisfy the OIA requirements and buy 'sensitive land' if they can establish that they will be intending to reside in New Zealand indefinitely. The OIO can only assess the bona fides of an individual's intention to reside indefinitely on a case-by-case basis.

New unit titles legislation

The Unit Titles Act 1972 currently governs the creation and management of developments such as apartment blocks. Due to major changes in the number, scale and nature of unit title developments since the 1970s, the need arose for the legislation to be reviewed.

The Unit Titles Act 2010 received the Royal Assent on 19 April 2010. Whilst this Act has now been passed into law, its commencement date will not be determined until the new unit titles regulations have been promulgated. It is anticipated that those regulations will not be settled until later this year. At that time the new legislation will repeal and replace the 1972 Act and its regulations.

Notable changes will be:

- » The voting threshold for certain decisions which previously required a unanimous resolution is lowered to a 75% threshold
- » Disclosure regimes are introduced. Sellers must provide disclosure statements to prospective buyers both before an Agreement for Sale & Purchase is entered into and before settlement. If these obligations are not met, the buyer may postpone settlement or cancel the agreement. The original owner of a unit title development is also subject to disclosure obligations, being required to disclose information to the body corporate once the original owner no longer has control over the votes of the body corporate, and
- » The Tenancy Tribunal's jurisdiction will be extended to include most disputes relating to unit titles.

While these changes are significant, the full effect of the legislation will not be known until the regulations contemplated by the new Act are drafted. These include the regulations which will prescribe the default body corporate rules, and also the form and content of the various disclosure statements required. These regulations could be a significant change for buyers, sellers, real estate agents and lawyers alike.

It is hoped that the new legislation will provide for more effective management of unit title developments in the future.