

Winter 2009

Mortgagee Sales – look before you leap!

If you buy a property at a mortgagee sale, you are entering into a contract which is quite different in its nature to an agreement entered into in other circumstances. The agreement is likely to be weighed heavily in the mortgagee's favour as mortgagee sales involve factors outside of the mortgagee's control, and which it will want to protect itself from. This may include an owner who will not leave the property, and withdrawal of the warranties most vendors give.

It is not uncommon for purchasers to face difficulties after settlement, such as having to evict a previous owner occupier, or having to deal with damage caused to the house by the disgruntled owner. In one instance the occupier took all the chattels from the property and sold them to pay other debts, leaving the purchaser out of pocket. Most mortgagee sales exclude all chattels.

Other common issues for purchasers at mortgagee sales can include:

- There is less protection for purchasers. The mortgagee will have removed the term in the agreement relating to the vendor's undertaking that all building work done by the owner is code compliant. The right for the purchaser to approve title is always deleted. Often purchasers will not be able to view the property beforehand if the owner refuses inspections. It may not be possible to ascertain if work has been carried out without a consent.
- The mortgagee does not guarantee it will give vacant possession and the purchaser may have to apply for a court order removing the owner.
- Once the contract is signed, it is unconditional and

thorough due diligence is necessary prior to signing. Even though a contract is unconditional, the terms may allow the bank to cancel the agreement prior to settlement if the owner pays the debt. This means it is uncertain whether settlement will actually occur until the day of settlement.

- The mortgagee may require the purchaser to insure the property from the moment the agreement is signed, because the mortgagee ceases to accept responsibility for loss from the moment the hammer falls.

Buying a vacant property at a mortgagee sale reduces the chance of the house and chattels being interfered with prior to, or after, settlement.

Mortgagee sales offer an opportunity to buy a property at a reduced cost but at much greater risk. To lessen the chances of problems occurring you must understand the agreement well and undertake a thorough due diligence investigation before entering into the agreement. You should seek legal advice before the auction and check the title, council records and the property in advance. However, there may still be some issues which arise and are out of your control as purchaser and these risks should always be reflected in the price paid.

The above is by no means an extensive list of the issues that a purchaser may face, but it is a reminder to put your ducks in a row before raising your hand for the winning bid.

For advice about buying at a mortgagee sale, or if your bank is selling your property, contact Graeme McLelland on (09) 407 0179.

Redundancy

With the world in the grip of a recession, New Zealand is facing challenging economic times. Employers are experiencing the economic squeeze and one of the solutions they may turn to is restructuring and/or redundancy. Unless employers deal with these situations carefully and comply with the legal requirements they may face additional costs in the form of personal grievances. Legal advice at the outset may save time, stress and money.

Employers are entitled to run their business as they see fit. However, they must have genuine commercial reasons for making employees redundant and they must

follow a fair process. It is in the process that employers often come unstuck.

As a guideline, employers must be able to show:

- the redundancy was based on genuine commercial reasons;
- the provisions of the employment agreement have been followed;
- the employer has been fair and reasonable in the way they have carried out the redundancy, and
- the action the employer has taken is fair and reasonable in all circumstances.

Genuine commercial reasons for redundancy

Genuine commercial reasons for redundancy may arise from restructuring and/or contracting out work, a decline in demand, or a sale or transfer of the employer's business. Employers must not use redundancy as a way of dismissing an employee who is not performing. Where redundancy occurs as a result of restructuring, the employer must make sure any new positions formed are not substantially similar to the position being made redundant or if so, that those positions are offered to the redundant employee. A position with a different title, but the same duties, will most likely be substantially similar.

The following are just some of the factors which will be relevant:

- substantial changes to duties
- change in level of seniority
- changes to salary or benefits
- change to the number of hours worked
- increased or reduced responsibility for other staff

Process

Having passed the "genuine reason for redundancy" hurdle, employers must follow a fair process, as required by the duty to act in good faith. This will generally involve:

- consultation about any proposal that may impact on the employee's employment;

- a consideration of any alternatives to dismissal e.g. redeployment, reduction in hours, job sharing;
- providing affected staff with information about proposed redundancies and the selection criteria for appointment to any new positions;
- following the terms of the employment agreement with respect to notice periods, payment and redundancy compensation;
- advising the employee of their right to representation and offering support; and
- where possible, providing counselling, career, financial and retraining advice.

Whether the process has been fair will depend on all the circumstances of the case.

Employers should note that the National Government has introduced the "ReStart" package to assist redundant workers. "ReStart" provides short term relief for low to moderate income families with children and also those already receiving the maximum accommodation supplement, along with help with securing new employment. A redundancy tax credit is also available making taxation redundancy payments fairer when the redundancy payment has pushed the employee into the higher tax bracket as a result of receiving a lump sum redundancy payment.

Sue Wooldridge, phone (09) 407 0174, can help you with your employment queries.

Snippets

Early release of deposit

If you are a purchaser of a property, have paid the deposit and are asked to agree to an early release of the deposit to the vendor (quite a common request), then think again! When a deposit is paid, the real estate agent is required to hold it for 10 working days. Vendors often ask the agent to release the deposit early to use it as a deposit on another house purchase. The agent may do so, provided the purchaser agrees. Be wary of agreeing to the release because the transaction might not settle. If the transaction does not settle and the vendor has already spent your deposit, you have no security and your deposit is gone.

Retention of the deposit until settlement in a trust account offers protection, especially where there is a mortgage on the title. If there is a mortgage, be aware that the deposit might be needed to settle the vendor's mortgage debt, and if released early and spent in other ways by the vendor, then the vendor might not be able to discharge the mortgage.

The key is to consider the issues carefully before agreeing to the early release of the deposit, particularly where the title is mortgaged. Agreeing to release the deposit directly to the vendor's bank may sometimes give more security but it pays to have your lawyer check it out first.

Graeme McLelland, phone (09) 407 0179 and Sue Wooldridge, phone (09) 407 0174 can give you guidance

on how to protect your deposit if you are asked to release it early and can also draft your agreement to protect the deposit until settlement.

Community group looking for a speaker?

We often work with local organisations on a pro bono basis to update members on recent law changes and topics of interest. Phone our office manager, Yvonne Burgham on (09) 407 0171 if you would like more information about this service.

Staff news

Sarah Jury has been away on parental leave since January and will be returning to work on 1 July. We look forward to Sarah's return. Sarah specialises in employment and relationship property work.

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