



**CRUICKSHANK PRYDE**  
Barristers and Solicitors

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CRUICKSHANK PRYDE 42 Don Street, P.O. Box 857, Invercargill 9840 | T: 03-214 4069 | F: 03-214 4760 | office@cplaw.co.nz  
Unit 23, Gorge Road Retail Centre, 159 Gorge Road, Queenstown 9300 | T: 03-441 2424 | F: 03-441 2426

This is the last edition of *Property Speaking* for 2015. We hope you've enjoyed reading our e-newsletter and that you have found our articles useful and interesting.

In this issue we explain more about the recently introduced bright-line test and there's an article with a reminder about getting us to review the Agreement *before* you sign it. The 'Property Briefs' section has an item on the need for sellers to look carefully at the real estate agency agreement, and a short piece on the subdivision process.

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*In our Winter edition we noted the government's proposed property taxation changes and 'bright-line' test. The legislation has now come into force and those changes are in effect; both parties to an Agreement for Sale and Purchase of Real Estate dated on or after 1 October 2015 need to be aware of their new obligations*

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## Look Before you Leap into a Contract

### Conditional property agreements can turn around to bite you ...

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The next issue of *Property Speaking* will be published in Autumn 2016.

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## The Bright-line Test

### New requirements for buyers and sellers of residential property

*In our Winter edition (page 4) we noted the government's proposed property taxation changes and 'bright-line' test. The legislation has now come into force and those changes are in effect; both parties to an Agreement for Sale and Purchase of Real Estate dated on or after 1 October 2015 need to be aware of their new obligations.*

#### Why have there been changes?

The government's intention behind the bright-line test was to introduce a capital gains tax on residential property bought and sold within a two-year period. The objective is to try to curb rising house prices, driven by large numbers of property investors in the market. Reserve Bank of New Zealand statistics show that investors have accounted for 33% of new residential mortgage lending in August, compared with first home buyers who made up just 10.5%.

The sale and purchase of property will be monitored through the parties supplying a tax statement that gives their tax details to the Inland Revenue. The tax statement will provide property details, the identity of the party and whether the party will be claiming an exemption to not supply their IRD number. Both vendors and purchasers need to make sure the information they are giving in the new tax statements is correct, as knowingly giving a false tax statement may result in a fine of up to \$25,000 for a first offence.

#### The 'main home' exemption

In our Winter edition, we noted that one of the few exemptions of the need to provide tax details is if the property is the 'main home'. The main home for tax purposes is considered to be the one dwelling that is mainly used as a residence by the person claiming the exemption, and with which the person has the greatest connection if they own more than one home.

If you are a New Zealand citizen and have been in the country within the previous three years, or you hold a New Zealand residency visa and have been in the country within the previous 12 months, you will be able to rely on the 'main home' exception. The exemption cannot be claimed by a company, an 'offshore' person, or someone who has already claimed the 'main home' category twice in the two years prior to the date of the third agreement to purchase property.

#### The effect on family trusts

It's also clear that the 'main home' exception will not apply to family trusts. This means every trustee of the estimated 400,000 trusts in New Zealand needs to be aware that they will be required to provide an IRD number for the trust when entering into an agreement to transfer property.

A large number of New Zealand family trusts will own the family home but will not own any income earning assets, meaning the trust will not currently have an IRD number. In order to complete settlement of property transactions, trustees must apply for an IRD number – a process which may take up to three weeks. Forms to make an application are available online, with the applicant required to provide a copy of the trust deed along with tax details of each trustee. Inland Revenue will then issue the trust with its own IRD number which is entirely separate to that of the trustees.

To avoid delays in settlement, we recommend applying for an IRD number for your trust before you even start the buying or selling process. Your transfer cannot be registered without an IRD number, meaning that if you can't supply the IRD number you will not be moving into your home on the day you planned, and you may also face hundreds of dollars in penalty interest.

If you need help to obtain an IRD number for your trust, or you have questions on how these changes may affect you, do get in contact with us as early in the process as possible. ■

## Look Before you Leap into a Contract

### Conditional property agreements can turn around to bite you ...

*In a bustling real estate market, significant pressure is often placed on purchasers to make an offer in a short timeframe, often with few conditions (if any). We often hear about the purchase once the parties have signed and have already incurred legal obligations that may be difficult to satisfy. The moral of the story is to talk with us before you sign the agreement. We outline below a situation that we hope you won't ever experience.*

Rob and Jess Brown<sup>1</sup> submitted an offer to buy their first home. The real estate agent had assured the Browns that the property was built in the 1950s, and it was solid. They made an offer of \$310,000 which was conditional on a satisfactory building report being obtained. Rob and Jess decided a finance condition wasn't necessary because their banker had said they were pre-approved to purchase up to \$350,000. The agent told the Browns they should make a quick offer to secure this property; they decided there wasn't enough time to consult their lawyer, Paul, before signing.

The offer was accepted; lawyer Paul advised Jess to contact a certified builder for a pre-purchase report. Against Paul's advice, Jess decided to take a cheaper option and asked her brother, Alan, an apprentice builder, to prepare a report in exchange for a box of beer.

The night before the condition was due to be satisfied, Jess was still waiting for the report. Alan promised he would inspect the property after work and email Jess once it was done.

When lawyer Paul called Jess, she told him that only the previous night Alan had identified that the property's electrical wiring was outdated. Although Alan hadn't emailed a report, Jess had already advised the agent that the building report condition wasn't satisfied and that the agreement was cancelled.

Paul told Jess and Rob that they had an obligation under the building report condition to provide the vendor with a written copy of the report. Alan quickly emailed Paul explaining the electrical issues, but Paul had concerns about Alan's report.

Paul wasn't surprised when the vendor's lawyer raised issues with the form and content of Alan's report and asked Rob and Jess to rethink their cancellation of the contract. The vendor's lawyer indicated that Rob and Jess hadn't done all they reasonably should have to satisfy the building report condition. The written report (email) was obtained after their notification of cancellation, was very informal (email only) and wasn't from an experienced builder. Paul also advised that they risked being sued for the vendor's loss on resale and were fortunate not to be sued already.

Rob and Jess realised they couldn't cancel solely due to the electrical issues, as this was not a condition of their agreement. They confirmed that the building report condition was satisfied, and they would complete their own electrical work. They then went to the bank and asked for loan documents to be prepared. Their banker was surprised because the bank hadn't approved the property as security for the loan; the pre-approval only approved the Browns for servicing a loan. The bank also required an insurance certificate prior to drawdown.

The insurance company refused to cover the property without an electrical report due to its age. Rob called an electrician to arrange an urgent electrical report, which confirmed the property had old wiring. The insurer refused to cover the property until it was rewired. Paul advised Rob and Jess that there were significant risks involved with renovating a property before settlement, but they had few options. The electrical work took an additional week to complete, causing penalty interest for late settlement of \$90/day.

In the end Rob and Jess successfully purchased their new home. Although they love their new house, they agreed that next time they buy a property they will talk with their lawyer before signing an agreement or attempting to satisfy any conditions. ■

<sup>1</sup> Not their real names.

## Property Briefs

### Selling your property? Avoid payment of commission to more than one agent

It's surprising that when selling property, the seller often pays little attention to the terms of the real estate agent's listing agreement – particularly when there may a substantial sum of commission involved.

*Seller of farm could be liable for commission to two agents:* The sellers of a farm in a recent case<sup>2</sup> could be liable for commission to a former agent despite the seller's understanding that the former agent would not charge them commission because it was committed to a 'protocol' in the district. Under the protocol the agents agreed they would not charge commission unless a successful sale was made within seven days of cancellation of their agency agreement.

Mr Smith had become dissatisfied with the first agent's progress on selling his farm, so he cancelled the agency agreement and engaged another agent. The second agent sold the property to a buyer who had originally been introduced by the first agent. Before signing the sale Agreement, the second agent had assured Mr Smith that the first agent was bound by the 'protocol'.

The first agent disagreed that it was bound by the protocol. The matter escalated and ended up in court. The first agent sought an order, without having to prove its case at a formal trial, that Mr Smith pay its commission. The judge refused to grant the order because he said that Mr Smith might be able to rely on the protocol. In order to successfully claim its commission the first agent will now have to prove its case by going through a successful trial process. If the first agent is successful at trial Mr Smith will end up paying commission to two agents – the second agent who actually concluded the sale and the first agent who introduced the buyer.

*Standard clauses designed to reduce disputes:* In order to help prevent disputes over the cancellation of agency agreements and the payment of commission, the Real Estate Agents Authority (REAA) and the Real Estate Institute of New Zealand have developed some standard clauses for agency agreements. Whilst it's voluntary for a real estate agency to use these clauses, we would certainly encourage sellers to only sign agreements with agencies that include these clauses in their agency agreements.

Key features of the standard clauses are:

1. The seller must choose either a sole or general agency, not both. The REAA disapproves of the commonly used automatic rollover clause where the sole agency automatically becomes a general agency at the end of the sole agency period. This is because sellers don't usually realise that the agency continues after the sole agency period has ended and they could still be liable for commission.
2. After six months from the end of the agency agreement in a residential sale situation, the seller can sell privately and won't be liable to pay commission to the agent who previously introduced the purchaser; it's 12 months in the case of a rural sale.

If you are selling a property it pays to check whether the standard clauses are included in your agency agreement. It also pays to talk with us if you wish to change agents to check you don't end up paying commission twice.

*(This is a condensed version of an article first published in New Zealand Farmer magazine in May 2015.)*

### Contact us early on in the subdivision process, not right at the end

As you will know lawyers and legal executives are involved in many stages of the subdivision process as it grows from an idea in a developer's mind through to the new titles being issued.

We thought it is timely to remind you all that it will, in the end, save you time, energy and money if you consult us in the first stages, rather than waiting until the survey plan is approved and lodged at LINZ.

We add value for you by:

- » Involving both the surveyor and LINZ in the process of subdividing the land or building
- » Analysing key documentation to identify any potential problems
- » Identifying key timeframes and the implications for all parties, and
- » Drafting the required documents to ensure the new titles can be issued and that they meet your needs along with the requirements of the territorial authority's resource consent.

The team approach works best – you, us and the surveyor. If you are thinking about a subdivision, remember to contact us right at the start. ■

<sup>2</sup> *Coast to Coast Limited v Smith* [2015] NZHC 687.