

APARTMENTS

There is a further check, which should be done for apartments (and all unit title property). There should be a condition in the agreement for sale and purchase that the agreement is subject to the purchaser obtaining, inspecting and approving the body corporate minutes.

The reason for this is that the minutes should disclose any issues, which the body corporate is facing including leaky issues.

The standard agreement provides that the vendor will supply a Section 36 certificate from the body corporate (under the Unit Titles Act 1972) not less than 5 working days before settlement, which should disclose such a problem, but the wording of this provision in the agreement does not allow the purchaser to avoid the agreement in the event that he or she does not approve this certificate.

This clause only provides that such certificate shall be provided, and the details that are required to be included, but does not provide any remedy if there is a problem disclosed. For this reason we strongly advise that there should be a condition in the agreement for any unit title transaction where the purchaser has to approve the body corporate minutes, and if such approval is not given (at the purchaser's sole and unfettered discretion) then the purchaser has the right to avoid the agreement and receive a full refund of the deposit.

LEAKY BUILDINGS

This topic could be the subject of a separate paper. Anyone looking at buying a property built since the 1990's must take special care to ensure that they are not buying a leaky building.

These buildings are usually constructed of non-treated timber frames clad with a "monolithic" cladding often of a "Mediterranean" design with a flat roof and no eaves, unsuitable for a rainy climate. The problems stem from water entering into the cladding and rotting the timber frames which can completely destroy the value of the house.

There has never been any judicial decision as to whether the Government has any responsibility through the Building Industry Authority which licensed the building inspectors and approved the materials.

Actions are brought against a raft of people involved including the architect, builder, project manager, various contractors who worked on the building (e.g. plasterers) the local council (which issued the Code of Compliance Certificate when the building was faulty), manufacturer of the cladding, and previous owner(s).

Developers, who are often at fault, have by the time the problem has emerged, folded their development companies leaving valueless shells. It is also worth recording that if you arrange for work to be done on your house that you then assume the liability of a developer!

If you must buy such a house – and we seriously advise against it – then it would be prudent to obtain written confirmation of the owner that the building is not leaky, or, if it is, that proper remedial treatment has been carried out.

Certainly the question should now be asked by every buyer of any property they are seeking to buy: "Is this a leaky house?"

If you are buying or selling a leaky building with knowledge then there are specific conditions to be included in an agreement to protect both parties. We have seen situations where a buyer with knowledge has not been able to mount a claim for a leaky building. There are also specific time limits for bringing leaky building claims.

Disclaimer

This article is background material to inform our clients regarding their sales and purchases and we assert our copyright. It is produced only for the use of our clients whom we urge to obtain our specific advice in advance of their transactions. Unfortunately, many clients present signed agreements before we have had the opportunity to advise on the transaction and in such cases, we are restricted to the wording of such agreements. We strongly recommend that clients show us their contracts before they sign as this provides the opportunity to tidy up any loose conditions or include conditions that have been omitted.

NEIGHBOURHOOD DEVELOPMENT REPORT

Looking to buy a property and want to know what is happening in the neighbourhood?

This Auckland City Council report provides an overview of building activity planned or in progress within a 100m radius of your site, as well as any licensed activity such as liquor licences, brothel licences, street trading licences, etc.

This report costs around \$50 including GST and if you go to the Auckland City Council website, you can download the report in Portable Document File (PDF) format.

The neighbourhood development report will give you the following information for properties within a 100m radius of your site:

1. CONSENTS

building consents are provided for three years (from date of approval)
planning-related resource consents for the past five years
subdivision resource consents are provided for the past eight years
engineering consents.

This report does not include project information memoranda (PIMs), consents where work has been completed or applications that have been withdrawn by the customer.

2. LICENSES

street trading licences
liquor licences for club licences, off licences and on licences for the past three years
special liquor licences for the past twelve months
environmental health licences, including
amusement gallery licences
brothel licences
camping ground licences
dangerous goods licences
food premises licences
food stall certificates
hairdresser licences
health protection licences
mortuary licences
Temporary liquor licence applications and licence applications that have been cancelled, closed, declined or withdrawn are excluded from this report.

CAUTION - BEWARE OF DISTRESSED SELLERS

A recent case highlighted the necessity for further caution. This issue particularly reflects the current state of the market with distressed vendors.

If a purchaser has any doubt whatsoever over the vendor's ability to repay the debt on the house from the sale proceeds (and a search of the title will reveal the number of mortgages on the property), a prudent purchaser will seek additional conditions in the agreement where the vendor's lawyer retains the deposit in his/her trust account until settlement; one could seek a condition that before the agreement is made "unconditional" that the vendor's lawyer makes full enquiry and provides an undertaking to the purchaser's lawyer that there are sufficient funds from the settlement of the sale to repay all monies charged against the title.

You could seek a condition that the agent is not entitled to the commission until settlement has been completed. This condition would have to be agreed separately with the agent as he or she is not a party to the sale and purchase agreement.

Otherwise the purchaser runs the risk that there are insufficient funds on settlement for the vendor to obtain the discharge of the mortgage(s), the sale is frustrated and the purchaser then has to seek a refund of deposit (which may have been spent by the vendor), while the agent selling the property may refuse to refund the commission on the basis that he/she has fulfilled his/her role by selling the property and no refund is legally required.

To add insult to injury, any of the vendor's mortgagees can then proceed to resell the property to someone else and you will have no prior rights to the property!

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