

BUYING & SELLING PROPERTY

THE SALE AND PURCHASE AGREEMENT FORM

When you buy a house, the agreement must be in writing to be legally binding. Over the years real estate agents and lawyers have agreed a standard form, which is reviewed from time to time. This form has many provisions and there are several which must be completed to protect the purchaser (e.g. finance and LIM). There are additional clauses that should be inserted (such as building inspection condition). In brief, there are usually three main conditions that will need to be completed or inserted: Finance, LIM, and building inspection.

Warning: The Real Estate Institute has recently introduced a new form intended to be in plain English. Unfortunately, this form may be flawed, has been much criticised, and to our knowledge is not in use. Please do not use this form, and if in doubt, please refer to your lawyer before signing.

There are some other sale and purchase forms available. CCH has such a form. In our view vendors and purchasers should use the ADLS / REINZ form [currently eighth edition 2006 (2) form] as it has been tried and tested many times. To use any other form is to add a further potential problem to an area which is already a minefield. We are not suggesting that any other form is deficient – we advise clients to stay with the popular and tested form.

CONDITIONS

When there is a condition in an agreement to buy & sell land one must “do all things which may reasonably be necessary to enable the condition to be fulfilled by the date of fulfilment”.

Conditions should not be taken lightly either when they are agreed or when they are satisfied or not. Any condition inserted into an agreement should be worded very clearly (we have seen some shockers – especially by real estate agents), but they are all to be treated very seriously and subject to the above caution.

The Court of Appeal upheld in the *Jury v. Fleming* case that the purchasers did not make sufficient attempt to sell their house (there was a condition in an agreement that the purchasers had to sell their house before the agreement to purchase the new house was unconditional).

We strongly advise that you ask your lawyer to check the agreement before you sign it, whether you are a vendor or purchaser, and not to treat any condition lightly as it could backfire. If there is a condition, make sure that it is carried out in accordance with the agreement.

1. LAND INFORMATION MEMORANDUM REPORTS (LIM)

You shouldn't sign an agreement without first having it checked thoroughly by your lawyer who will discuss with you the importance of obtaining a LIM and a building inspection.

Buying a property is for most of us the most important investment we ever make and a LIM contains the barest minimum of information that should be obtained before confirming a purchase. We strongly advise that a LIM is always required. There is a box to “tick” on the front page of the agreement form confirming this as a condition of the agreement. (We will also mention below our strong advice that a building inspection report condition is required for all purchasers).

These are extremely important clauses; so don't be talked out of them. The standard agreement allows the buyer 15 working days (3 weeks) to approve the LIM but often the agent cuts this down to 5 days – which is too tight.

You obtain the LIM from the local council. Auckland City Council charges \$243 for a non-urgent report, which takes 10 days, and \$312 for an urgent report in 4 hours.

Most of the information in the LIM is obtainable inexpensively by visiting the local office, and includes details of the legal description of the property, rates, town planning and zoning information, details of potential flood areas, slipping or land instability, site contamination, information on public and private storm water, sewer and drainage, resource consent or building issues, code of compliance certificates (signed and unsigned) and requisitions.

The LIM report is historic in that it only covers the resource consents given, building consents granted and requisitions made by the council. However the council may not be aware of any further developments to the building that have been made without Resource Management Consents or building consents.

We have seen a LIM, which on the surface was innocuous, but it was only by carefully examining the underlying documents (approved plans and building permits on file) and comparing these with the property itself that we discovered that the owner had done works in addition to the plan, which were unpermitted, and without Resource Management Consent. Not only that, there was substantially offending (and potentially dangerous) work on the property that was not recorded on the file that may have been carried out before 1991, and arguably not covered by the current LIM regime.

LIM reports are of limited application and are only as good as the council records they are based on. There is no guarantee, though the council gives you a copy of what is on their records, and they have a disclaimer of liability. Illegal works for which no permit has ever been sought will not show up and neither will water tightness issues unless there has been a requisition.

The LIM debate was sparked by the Whitford case of Greg Wilson and his parents who planned to build a home on a hillock on their land. They obtained a LIM from the Manukau City Council, which did not disclose that the site was a former pa. Auckland City Council advises that waahi tapu sites are included in their LIMs along with information about historic buildings, protected trees and volcanic cone areas, but Manukau City Council does not include waahi tapu sites in its reports.

Don't accept LIMs obtained by the vendor. Tempting as it may be to save the dollars, if a LIM is to be relied on it is crucial to create a contract between the purchaser and the council by the purchaser's payment of the LIM fee.

It is the lawyer's job to peruse the LIM carefully and interpret it for the clients. When there are matters that concern the buyer discovered in a LIM there is a tortuous path to follow of notices and counter-notices, with specific time limits, before the vendor either fulfils the requisition, or the contract is “avoided”. This is a time-consuming, expensive and nail-biting period for all concerned.

The simpler route would be to make the contract subject to the purchaser approving in all respects the LIM, council property file and an inspection to be carried out by a registered building surveyor (by a certain date). If the property is not up to scratch then the condition is not met and the contract ends.

A keen vendor would have all relevant information on hand to give to purchasers.



If the auction is not successful usually the property is offered to the highest bidder after auction. The agent will want the auction form signed. There is no legal requirement for this and a purchaser has the right to insist on a standard form contract with all the fine print protections and even add further conditions such as finance, LIM and building inspection.

You should visit the local council office and read the property bag or file. This will cost \$15 plus any photocopying of anything in the report that you wish to take away. This bag or file contains the complete history of the house or structure: plans, specifications, inspections, sign-offs, correspondence, resource consent applications and decisions, engineering reports relating to the land and house.

The title (which is held by LINZ electronically and will be searched by your lawyer) covers ownership, the type of title (fee simple, leasehold, unit title or cross lease) and the land itself (any fencing agreements or covenants), and mortgages. You may consider booking a session with a town planner (free) to discuss the town planning zoning, and what can or can't be done with the land and the house. You should satisfy yourself as to the surrounding properties and their zoning. You may not wish to find a tall apartment or commercial or industrial building being built alongside your house.

2. BUILDING INSPECTIONS

Make sure that the agreement has a suitable condition to allow the building inspection report. Some clauses are by way of default, i.e. if you don't notify the vendor of any problem then the condition is deemed satisfied. We do not like this wording and prefer it to be at the discretion of the purchaser; that notice that the condition is satisfied must be given in writing, and that the purchaser does not have to set out the issues and give the vendor the right to remedy any defaults.

Typically, a lawyer acting for a vendor will want to tighten this condition, while a purchaser's lawyer will want to leave it open to the purchaser's unfettered discretion with no mandatory disclosure details of any problems that the purchaser has found to escape the agreement.

Obtain a building inspection from a registered building surveyor, which should include all the information in a LIM, a thorough inspection of the property and will advise whether there have been any building works carried out without consent and/or permit, or not signed off. Such a report usually costs around \$500. Make sure that the inspector has a moisture meter and gives moisture readings for all rooms with details of what reading level is acceptable.

Go to the council and inspect the property file. Read all the permits and approvals, certificates of acceptance, safe and sanitary reports (and requisitions). Check the plans and Code of Compliance Certificates. Compare what you find on the file with the property itself to make sure that all the changes have been properly consented to, permitted and signed off.

This is a matter of checking what is NOT in the file, rather than what is there. It will only cost a few dollars for copies of all the plans consents and permits. You should also book a session with a Council town planner (it will cost you nothing) to go over these details and also check such things as zoning, site coverage, future nearby development and your future building wishes to see whether they are permissible.

While stating the obvious, you won't find un-permitted work on this file, and the only way you will discover this is by comparing the permits and consents in the file and making sure they match the house.

For an older house, we also recommend a check by an electrician to make sure that the wiring is satisfactory. Older houses may be unsafe and require re-wiring, another expense to consider. Houses with septic tanks should be inspected by an expert.

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.

DEPOSIT

If you are a purchaser, you would be wise to have a provision in the agreement that the deposit is not to be paid until the agreement is unconditional.

There is a natural tension between the vendor and the purchaser. The agent will seek the usual 10% deposit when the agreement is signed. While this is conventional, it is not essential. Any amount will suffice. If you are the vendor, you will want 10% paid, and if you are the purchaser, you will want to pay the minimum.

The agent will want the maximum deposit paid as it protects the agent for his/her commission. There is no rule that the deposit has to be paid to the agent or held by the agent. Agents and vendors want the deposit paid when the agreement is signed. If the agreement is unchanged, that is what will happen. But there is nothing stopping a purchaser offering a lesser deposit of say 5% (or even less) to be paid when the agreement is unconditional, to be held by the vendor's lawyer in his/her trust account, and not paid out until settlement.