

Welcome to our new look *Property Speaking*. We hope you enjoy its brighter fresher design, and continue to find our articles both useful and interesting.

To talk further about any of the topics covered in this e-newsletter, please don't hesitate to contact us – our details are above.



Legal Boundaries: Why titles matter

You have just moved into your new home and your neighbour knocks on your door. They say that your garage is two metres into their boundary, and that they need this space to widen their driveway. Suddenly you wish you had known where your boundary was before you purchased the property.

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Test the Depth Before You Jump In: Always do due diligence

It's standard to test drive a vehicle before you buy it, so it's equally as important that you also do your homework on a property before you sign up. 'Due diligence' is a term that means investigating and researching everything about a matter before entering into a contract. Completing thorough due diligence is likely to lessen the chances of any nasty surprises coming to light after settlement, saving you a lot money and hassle in the long run.

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Misrepresentations in property transactions: keep to the facts

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When builders go into liquidation

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There is a great deal of information now available which shows the boundaries on properties that were previously not apparent without a survey. With the rise of the internet, prospective purchasers are raising issues as to the location of legal boundaries that existing owners may never have known about previously.

Most local council websites provide GIS-Mapping or other forms of aerial maps that give an indication of legal boundaries in relation to the land and dwellings for any given property. These provide invaluable

information, given that most real estate agents include clauses in sale and purchase agreements in which the purchaser declares that they do not rely on the agent or vendor to point out the legal boundaries.

Real estate agents often limit their liability in relation to pointing out the boundaries of a property. A 2013 decision of the Real Estate Agent's Disciplinary Tribunal¹ found that an agent should simply recommend that the purchaser consults a surveyor where the boundary pegs are unable to be located on the property. Unfortunately with older properties, survey pegs may have long disappeared.

It's important for a purchaser to make these enquiries. If a significant part of a dwelling is outside the legal title boundaries, this could have consequences for the transaction. As legal ownership and securities are registered on land, and the dwelling is simply a fixture on that land, many lenders are not prepared to accept such properties as security for a loan, and an insurer may have difficulty providing cover.

¹ *Rae v REAA & Burch* [2013] NZREADT 3

Finding out *after you've signed the agreement*

If you have already signed an agreement to purchase and you find that the dwellings are outside the legal boundaries, you may be able to 'requisition' the title. A requisition is a request that a restriction or matter causing a defect on the title is removed by the vendor. However, in light of a recent High Court case², issues may arise if the title is 'limited as to parcels'. These titles were created when the New Zealand system for governing titles to land was restructured between 1870 and 1924. During this process, the land was surveyed and accepted by the Land Registry Office before the Crown guaranteed the title. To speed up this process, owners could also apply to have their land title converted into the new system without a survey, but the land area and boundaries would not be guaranteed. Consequently the title would be noted as 'limited as to parcels'.

In the *Forde* case, Justice Gendall recommended that if a title is 'limited as to parcels' and has dwellings outside of the title area, then it's the purchaser's

² *Forde v Li* [2016] NZHC 219

responsibility to obtain a survey and resolve the title defect. Although this decision is under appeal, it suggests that a purchaser would not be entitled to make a requisition for dwellings outside the boundaries in a situation where a title is 'limited as to parcels'.

There are several steps that we recommend both purchasers and vendors take so that you can avoid unpleasant surprises during your property transaction:

- » Discuss this with us. We can search land titles online and look at the GIS-maps, or provide you with links for your own research.
- » Google to find your local council's GIS-maps or 'cadastral survey maps'. Check that the fence lines and structures are all inside the lines which represent the legal title to the property.
- » Inspect the property for survey pegs if the property is relatively new or it's on a vacant section. If you are buying a vacant section (which is not limited as to parcels), the vendor is obliged to point out the legal boundaries and have survey pegs in place. ■

Test the Depth Before You Jump In: Always do due diligence

It's standard to test drive a vehicle before you buy it, so it's equally as important that you also do your homework on a property before you sign up. 'Due diligence' is a term that means investigating and researching everything about a matter before entering into a contract. Completing thorough due diligence is likely to lessen the chances of any nasty surprises coming to light after settlement, saving you a lot of money and hassle in the long run.³



Take your time

If you don't have time to investigate a property before putting in an offer, ask the agent to insert a due diligence clause into the agreement. This will give you time to ensure that the property is suitable for you in all respects, as well as giving you the ability to cancel the agreement if you discover anything untoward about the property within the due diligence period.

There's no reason why due diligence cannot be completed within five working days. In

the current sellers' market, however, this may not always be possible. Some vendors may prefer a 'cleaner' offer with fewer conditions, even if it's a lower purchase price. If this is the case in your situation, give us a quick call to discuss your options before signing the agreement.

Completing due diligence is particularly important if you are looking at buying a property at auction, as it is of course an unconditional purchase. We often see clients spend time and money on due diligence only for the opening bid to exceed their limit. Spending money before rushing into a contract, however, may save you a larger unexpected bill in the future.

What to look into

When doing due diligence of a property, we recommend assessing the following factors:

- » **Land Information Memorandum (LIM):** Review the LIM to ensure that all necessary consents for the dwelling, garage, and any alterations have been applied for, and the relevant certificates have been issued.
- » **Builder's report:** Have a qualified builder inspect the property to make sure it's structurally sound, watertight and free of any major defects that could cost you thousands to fix. (There's more on the importance of a builder's report in *Property Speaking* Autumn 2015.)
- » **Title review:** Check all easements, covenants and other registered interests.
- » **Finance:** Even if you have pre-approval from your lender, it's best to get written confirmation of finance sufficient to complete the purchase, with your lender approving the property as security.
- » **Insurance:** In *Property Speaking* Spring/Summer 2015 there's a story that stressed the importance of getting confirmation that the property is insurable. Your lender will not advance you the funds to settle if there's no insurance over the secured property.
- » **Valuation:** Make sure you're not overpaying or over-capitalising. Your lender may require this too.
- » **Lease/tenancy:** Review the terms of the current lease/tenancy agreements in place for the property to ensure viability and future obligations. Getting a rental appraisal should also be considered to determine the current market rent.
- » **Council District Plan:** Make sure your intended use for the property is allowed under the District Plan, or resource consents may be needed.
- » **Council property file:** Remember the council only knows what it has been told, so check to see if this matches up with what is actually on site.
- » **Local area:** Take time to check out the neighbourhood where the property is situated. The area may experience different sounds and smells that you wouldn't know about after a 20-minute visit. You may wish to check with the council about any upcoming projects in the area that may affect its character.
- » **A methamphetamine test:** Unfortunately it's more common than you think.

Whether it's your first home or another addition to your investment portfolio, purchasing a property is a huge commitment – so it pays to do it right. Conducting due diligence and contacting us at the earliest opportunity will help to ensure your new property will meet your expectations. ■

³ We have more on reasons to check a property before signing the Agreement in Property Briefs – Misrepresentations in property transactions, page 4

Property Briefs

Misrepresentations in property transactions: keep to the facts

The difference between 'misrepresentations' (which may support a claim for damages) and 'mere puffery' (being statements no reasonable person would take seriously) isn't always clear. Enticing a purchaser into a contract by misrepresentations was a costly mistake by the vendor in a recent case.⁴

Aldrie Holdings Ltd (through its director Ms Laboyrie) purchased a farm for \$2,900,000, but failed to make proper investigations before confirming the contract. Instead Aldrie chose to rely on statements made by Mr Prout, the vendor's agent. Mr Prout boasted that the level of pasture, milking shed and water at the property were 'excellent'. Given Ms Laboyrie's general business experience, the judge held that these statements were clearly puffery as a reasonable purchaser would have made further enquiries to validate those claims.

Aldrie did partially succeed in its claims against the vendor for misrepresentations regarding the effective area of the land, average production levels, fertiliser applied and grazing on 'run-off' properties. Although

the judge acknowledged Ms Laboyrie should have checked the information provided to her, he found that the misrepresentations were an 'operating' cause of Aldrie's loss (estimated at \$500,000).

In determining compensation, the judge referred to the concept of caveat emptor – let the buyer beware. Purchasers must not blindly enter into contracts and become 'the authors of their own destruction'. The judge quoted a previous judgment highlighting the need to consider "the position in life, experience, and skill of the person to whom the [statement] was made".⁵ The compensation awarded to Aldrie was discounted to \$250,000 as Aldrie's failure to take reasonable care to look after its own interests contributed to its losses.

Property transactions often involve significant assets. If you're buying a property, you need to make full enquiries about the property and seek advice from the appropriate professionals at the outset. Similarly, if you're selling, you must be careful when dealing with prospective purchasers and avoid the temptation to make exaggerated boasts.

When builders go in to liquidation

Earlier this year, Stonewood Homes went into liquidation with more than 100 homes in Christchurch under construction. This left customers uncertain as to when their builds will be completed.

Unlike a number of builders, Stonewood Homes offered Master Build Guarantees meaning that Registered Master Builders has assured customers that their builds will be completed. However, not all builders offer independent guarantees.

If you are contracting a builder who does not offer a guarantee, it's important you do thorough research. In particular, you should negotiate:

- » **Progress payments:** You should only pay for the value of work which has been completed at each stage of the build process. This ensures that if anything goes wrong, at least you have only paid for what is 'on the ground',
- » **Insurance:** Builder's insurance needs to be viewed in light of all projects the builder is involved with. It may be that what seems like ample coverage when expressed as a total insured amount over all builds, is actually insufficient when

divided between that builder's various build projects.

- » **Timing:** Always allow for unexpected delays when budgeting. Although Stonewood customers have been assured their builds will be completed, many will be paying both a mortgage on their already-made progress payments as well as alternative living expenses while they are unable to occupy their new homes.

When choosing a builder, the availability of an independent guarantee should be a major consideration. However, even if your builder does provide a guarantee, it's important that you comply with the eligibility requirements as cover is not automatic.

Every build is different and is a significant undertaking for most people. If you'd like more advice on your prospective build, please be in touch with us. ■



⁴ *Aldrie Holdings Ltd v Clover Bay Park Ltd* [2016] NZHC 250

⁵ *Closurepac NZ Ltd v WS 2014 Ltd* [2015] NZHC 1587 citing *Easterbrook v Hopkins* [1918] NZLR 428 (HC) at 442