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PROPERTY eSpeaking

MIKE LUCAS LAW FIRM 164 Great South Road, Manurewa, PO Box 75 144, Manurewa 2243, DX EP76006 | Ph: 09-269 2844 | Fax: 09-269 2847
reception@mikelucaslaw.co.nz | www.mikelucaslaw.co.nz

Welcome to the Summer edition of *Property Speaking*. We hope you find the articles both interesting and useful.

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

INSIDE:

Residential Building Contracts: Homework important when building

Building a new home can be exciting, as well as being rather daunting. Stories abound of disappointments and building hassles. But it needn't be like this if you do your homework before starting the build, read and understand the building contract and make sure you get professional advice before you sign the contract …

CONTINUE READING

Facebook: Is this your personal property or not?

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Property Briefs

Owning a cross lease … CONTINUE READING

Cross lease insurance … CONTINUE READING

Making alterations to your dwelling on a cross lease title …

CONTINUE READING

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The next issue of Property Speaking *will be published in April 2015.*

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AN ASSOCIATION OF INDEPENDENT LEGAL PRACTICES

Residential Building Contracts: Homework is important when building

Building a new home can be exciting, as well as being rather daunting. Stories abound of disappointments and building hassles. But it needn't be like this if you do your homework before starting the build, read and understand the building contract and make sure you get professional advice before you sign the contract.

When building your new home it's important to carefully read and understand the building contract. Research the building company to find out who owns and controls it, how long it's been in business, who you'll be dealing with on a day-to-day basis, and any issues the company, its directors and shareholders have experienced. Speaking to other people who have recently used the building company is also a good idea. Below we list (it's not exhaustive) some of the main points you need to consider whilst you build.

Finance: If you are borrowing money to build your home, before you sign the building contract make sure that your lender has reviewed the contract, approved your finance unconditionally and agreed to meet the progress payments as specified in the contract. Get this agreement in writing from your lender. Most building contracts allow the building company to charge penalties if you're late in making a payment. If your lender is making the progress payments for you, make sure it will meet those obligations on time on your behalf. It's very important to ensure that the final payment is due after issue of the code compliance certificate, not on practical completion.

House and land package: If you're buying a house and land package (the build company is building a home for you and selling you the land in one transaction), you shouldn't make progress payments. You shouldn't pay for improvements on land that you don't own. You should only pay a small deposit (no more than 10%), with the balance payable when the house is completed, including issue of a code compliance certificate. Then the title to the land and house are transferred to you.

Fixed price? The total build cost specified in the contract is usually subject to variation. With a fixed budget for your build you need to understand what cost increases the building company can pass on to you. Most contracts allow the builder to pass on increased costs arising from changes to the plans and specifications required by the local authority for the issue of required consents (building and/or resource consent), any increase in the cost of materials and labour between signing the building contract and undertaking the build, and the increased costs arising from additional excavation and/or foundation work.

Timeframes: The contract will probably not include a timeframe for the builder to start work after the building consent is issued or a timeframe within which the builder must complete the build. We recommend that the building contract includes reasonable timeframes, and for penalties to be paid by the builder if those timeframes aren't met. Penalties will allow you to recoup all or some of the costs you will incur from late completion of your home. You should also include a clause allowing you, at your option, to cancel the contract if the build isn't completed within an extended timeframe.

Plans and specifications: Before you sign the contract the plans and specifications must be finalised and they must exactly record your instructions and intentions. The plans and specifications must be referred to in the contract and be annexed to the building contract so they form part of that contract. You should initial the bottom corner of every page of the building contract, including every page of the plans and specifications.

Verbal statements versus written contract: You shouldn't rely on verbal agreements between you and the builder. Insist that everything you agree with the builder is written into the building contract.

Master Build Guarantee: We recommend you obtain a Master Build Guarantee, and ensure that the contract includes an obligation on the building company to remedy any defects that arise within 90 days of moving into your home. If possible, you should retain 5% of the final instalment until all defects within the 90-day period have been remedied.

Insurance: It's vital that your new home is insured throughout the build; the building contract must specify whether it's your responsibility or that of your builder. If you're borrowing money for the build, the lender will require insurance. The builder should also have current public liability insurance.

Progress payments: Don't, under any circumstances, make advance payments to your builder. You must ensure that your progress payments accurately reflect the value of the work that's been completed, and then you pay.

Getting professional advice before starting your build will help ensure it goes smoothly and there are no surprises. Happy building.

« BACK

Facebook: Is this your personal property or not?

Within five seconds, you can take a photo on a smart phone and share it with the world. Or the world on Facebook. It can't be denied that Facebook and other social media sites have revolutionised the way we communicate with our 'friends' or our potential customers. However, the question of whether you continue to own your Facebook profile is a matter of debate.

You would assume that you have 'ownership' of your Facebook 'page'. You have possession and control of your Facebook account and profile. The ownership of original work relating to photographs, literary work and videos is covered in New Zealand by section 14 of the Copyright Act 1994. In the common law, a body of case law supports a copyright owner if any entity infringes the rights of a copyright owner. Potentially, with Facebook accounts, each Facebook post is arguably an original work being published and this blurs the lines of the law relating to copyright. On a practical level, it's now a case where technology and society has moved light years ahead of the legal rules applying to this area. So what can you do to protect your privacy and information?

At the bottom of the Facebook page there's a link to the Terms and this takes you to another website page detailing the terms you agree to when you're a Facebook user. In using Facebook, you're required to continually abide by their Terms at all times, keeping in mind that Facebook is entitled to change its Terms at any time. If you're a Facebook user, the top three facts you need to know about the content and information that Facebook 'receives' from you are below.

1. Do I own my Facebook account?

Your account includes your login, the information you provide Facebook and the content you upload and share. The Terms define the words 'content' and 'information' as being separate. Your *content* is the photos, videos and posts that you make while using your Facebook account, whereas your *information* is your name, date of birth and any email address or mobile number you supply. For a business, if you're thinking of selling your business then it may mean supplying your Facebook account details as a part of the deal.

Facebook Terms maintain that it's your responsibility to understand your account and privacy settings. Therefore if you don't bother to set your own controls, then the risk is on you entirely for any information and content being circulated that you don't want out in the public arena.

2. Do I own my Facebook content?

Initially, you own the photograph and/or the video you take. You will, most likely, be able to maintain control of the specific photograph or video if you don't email or share in any way. But what's the point in that we hear you ask?

Remember, once you upload your content to your Facebook account, your 'Friends' can share with their 'Friends' and so on.

The best option is to be prepared that once you share a photo then you have lost control of who can use this image. This doesn't impact so much if you're using Facebook on a personal basis. There is, however, more risk if you're using Facebook for business as you can upload content which breaches another's copyright or another person can more easily set up a business which looks similar to yours at very little or no cost.

3. What can Facebook do with my information?

Facebook largely uses your information for promotional purposes to target advertising for a specific demographic. Whilst Facebook may promise that it will always be free to the user, this comes at the price of foregoing some of your privacy and being subjected to advertising while trying to see what your 'Friends' are up to on holiday. If you want to avoid a breach of your privacy, then we suggest that you provide as little information as possible to Facebook.

In short, you can't assume that you'll always be able to control your content and information once the Facebook platform has received your information and content. Remember you are a Facebook user at your own risk. ■

Property Briefs

If you're considering buying a house, unit, flat or apartment on a cross lease title, you should acquaint yourself with the implications of what this means for you – not only at the time of purchase, but also looking ahead in case you want to make alterations.

Owning a cross lease

A cross lease title consists of two parts; the first is an undivided share of the whole piece of land that the dwelling or 'flats' are built on; the second is a registered lease (Memorandum of Lease) for a fixed year period for each flat owner. Each owner has exclusive possession of their own flat for residential purposes and they are referred to as lessees and lessors.

You will have exclusive use of your flat and any land allocated to that flat. Each owner enters into a covenant agreeing not enter into each other's exclusive area. Any land that's outside the covenants (such as a shared driveway) can be used as a common area by all the flat owners.

There are some downsides to cross lease ownership. Each owner may not cause annoyance, grievance or disturbance to each other. You also need the consent of the other owners to make alterations to the outside of your flat – there's more on this below.

Cross lease insurance

The Memorandum of Lease states that you must keep your property insured at all times. You may insure your own flat independently or there may be an arrangement where all flats are insured under a single policy and the premium is shared. You must notify your insurer of any changes you make to the footprint of your flat. If your flat is damaged there's likely to be an obligation for you to repair/rebuild your property to the original footprint before the damage occurred. There may also be a standard of repair that has to be met.

Often other interests will be in place on a cross lease title such as a bank as mortgagee; these parties may need to reach an agreement regarding settlement of your claim.

Making alterations to your dwelling on a cross lease title

If your alteration is structural but non-load bearing, you'll need consent from the other flat owners. This could include moving internal doors or partitions. Consent can't be unreasonably withheld and, generally, this type of alteration will have little impact on neighbouring owners.

Alterations which involve any movement or replacement of load-bearing beams or that change the exterior shape of the building (including the addition of an extra storey) are structural and must have the consent of other owners. A cross lease plan shows the flat footprint and where this is changed by alterations, a surveyor will need to complete a new flats plan to show the new dimensions and a new cross lease will need to be completed. If you plan to build any enclosed structure attached to the original flat such as a conservatory or extension you must also follow this procedure.

Often owners who have completed work will have obtained any required building consents and aren't aware that a new flats plan is required. Consents granted by the council for any work done will not mention the requirement to update the flats plan and therefore it's not picked up until you come to sell your property.

If you've completed your structural alteration but haven't completed a new flats plan (where required) you can insert a clause in the Agreement saying that the purchaser accepts the defective flats plan and will waive any right to raise any issues arising from the Certificate of Title.

Cross leases are often not fully understood by real estate agents or purchasers. If you're buying a flat on a cross lease title or making alterations, make sure you talk with us early on so we can explain how it will work best for you.