Property Speaking

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Welcome to the Winter edition of *Property Speaking*.

We hope you enjoy reading this e-newsletter, and that you find the articles to be both interesting and useful.

To talk further about any of these articles, or indeed any property law matter, please don't hesitate to contact us – our details are on the top right of this page.

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Vacant possession

What does it mean?

If you are buying a property and intending to live in it, one of the first things that you should ensure is that the property is being sold with vacant possession.

Vacant possession is an important feature of every property transaction. Without vacant possession being provided by the seller, the buyer cannot take possession of the property until it is vacant.

If you are buying a property and intending to live in it, one of the first things that you should ensure is that the property is being sold with vacant possession.

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GST and land transactions

Understanding your tax obligations

If you are buying or selling land (with or without a home on the section), it is important to have an accurate understanding about your tax obligations and whether GST will be applicable to your transaction.

GST is not typically applicable in residential sale and purchase transactions but, if you are GST-registered and the sale is part of your taxable activity, GST may apply.

If GST is (or may be) appiicable to your transaction, it is important that you get legal and accounting advice before signing the agreement.

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Healthy home standards

All landlords are responsible for ensuring their rental properties comply with healthy homes standards (heating, insulation and ventilation) from 1 July 2025.

Sunset clauses

The Property Law (Sunset Clauses) Amendment Bill was introduced into Parliament on 1 April. The bill is aimed at restricting sellers developing vacant plots of land from using 'sunset clauses' to cancel sale and purchase agreements.

Real estate agent commission – claim or not to claim?

We explore the situation where a real estate agent is not entitled to be paid their commission.

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Vacant possession What does it mean?

If you are buying a property and intending to live in it, one of the first things that you should ensure is that the property is being sold with vacant possession.

Vacant possession means that you receive the property without the previous owners, tenants or their possessions (not included in the chattels being sold with the property) still occupying the property or any rubbish still occupying the property. This is an important feature of every property transaction; without vacant possession being provided by the seller, the buyer cannot take possession of the property until it is vacant.

Timing for vacant possession

Vacant possession needs to be given to the buyer no later than 4:00pm on the settlement date. Best practice if you are selling is to have moved out as soon as possible, ideally before the settlement date so that there are no unnecessary delays on the actual settlement. This isn't always possible if you are settling on the property you're moving to on the same day. In this instance, it is important that you let us know not to settle until you can provide vacant possession. You must have all of your belongings moved, and any rubbish cleared from the property so your buyers can move in straightaway.

At the same time, it is prudent that the property that you are moving into is also vacant. If you're relying on being able to move items out of your property to your new one and that seller is unable to settle, then technically you may not yet be able to provide vacant possession of the property you are selling yourself.

Clear communication with us regarding timing and/or pre-planning or storing items ahead of your settlement can help alleviate this kind of pressure on the settlement date. The times for performance of your settlement day obligations are all recorded in clause 3 of the standard sale and purchase agreement of real estate, along with the remedies available to buyers where vacant possession cannot be provided.

Tenanted properties

The circumstances where a property would not be sold with vacant possession would usually include a tenanted property being bought for an investment purpose where the buyer wants to retain the current tenant for rental income. Due to this being a relatively unusual occurrence, sellers looking to make their sale as attractive as possible should consider selling with vacant possession so their potential sales market is not limited.

If you are selling a property that is tenanted and want to provide vacant possession, you should ensure that you give your tenants the requisite notice under the Residential Tenancies Act 1986 that they need to move out in the required time period. Failing to do so could result in delays to the settlement of your sale that could potentially cause penalty interest to be payable to the purchaser.

Unable to provide vacant possession?

If you cannot provide vacant possession for your buyer on the settlement date, there are some actions that may be taken by the buyer set out in clause 3.13 of the agreement.

Refusal to settle: If you cannot move out and are still occupying the property or if your tenant has not moved out due to not being given the requisite notice or some other dispute, the buyer may refuse to settle. This can be a serious problem where you are relying on funds from your sale to complete a purchase; it may result in a chain of defaults for which you (as the originating defaulting party) may be liable. The cost for delaying settlement is generally prescribed by the penalty interest rate that is recorded on the front page of the agreement.

Withholding funds: If you have moved out but left rubbish and/or other belongings at the property, the buyer may seek to withhold a portion of the purchase price on settlement until this is removed. If you do not remove these items within an agreed time period, the buyer may retain those withheld funds. Again, if you require every penny from your sale proceeds, this could also trigger a chain of defaults.

Compensation claim: In some instances the buyer may claim compensation from you under the compensation process in clause 10 of the agreement. This will be a claim for the cost of removing any items left behind that the buyer has had to dispose of or any other costs that the buyer has incurred as a result of you failing to provide vacant possession. A disputed claim for compensation could result in a delay to settlement while the dispute is resolved.

Get organised

Due to the severity of the consequences of not providing vacant possession and the potential cost associated with failing to do so, it is crucial that you discuss with us your transaction timeline to ensure that your settlement proceeds smoothly rather than turning into an expensive nightmare. +

GST and land transactions

Understanding your tax obligations

If you are buying or selling land (with or without a home on the section), it is important to have an accurate understanding about your tax obligations and whether GST will be applicable to your transaction.

GST is not typically applicable in residential sale and purchase transactions but, if you are GST-registered and the sale is part of your taxable activity, GST may apply.

Potential GST outcomes

If the buyer and seller are both GST-registered, the transfer of land is part of a taxable activity (for example: farming, or a commercial building), and the property is not used as a private residence, the transfers are typically zero-rated for GST (meaning GST is charged on the transaction at a rate of 0%).

If the buyer is GST-registered and the seller is not GST-registered, and the buyer intends to use the land as part of a taxable activity, the buyer may be able to claim GST.

If the seller is GST-registered (and claimed GST) and sells the land to a buyer who is not GST-registered, or does not intend to use the land as part of a taxable activity, the seller may need to return GST to Inland Revenue following the sale.

There can be additional complications where some part of the property is used for private purposes, and some part is used for a taxable activity. In this instance, some of the purchase price may be subject to GST, but some part of it may not.

Warranty as to GST status

The standard sale and purchase of real estate agreement contains a statement on the front page – 'the vendor is registered under the GST Act in respect of this transaction and/or will be so registered at settlement.'

If you are GST-registered and the sale is a taxable supply, you will need to complete schedule one in the agreement. As a seller, you will need to tick either 'yes' or 'no' to this statement. You must provide a warranty that the answer you provide is correct and will remain correct as at settlement. If it later transpires that your answer was incorrect, you have breached a warranty and could be liable to the buyer for any losses they have suffered because of this breach. For example, if you provided a warranty that you were not GST-registered in relation to the transaction, the buyer may presume that they may claim GST from Inland Revenue following settlement if they will be GST-registered and intend to use the property for taxable supply. If you were, in fact, GST-registered, the buyer will not be able to do that, therefore you may be required to reimburse 15% of the purchase price to the buyer due to your breach of warranty.

If you are the buyer, the agreement contemplates your GST status potentially changing throughout the transaction. For example, you may initially sign the agreement in your personal name (and you are not GST-registered) and later you nominate a GST-registered company to complete the purchase.

The purchase price will be expressed as either 'plus GST (if any)' or 'inclusive of GST (if any),' which dictates how much you need to pay on settlement, depending on your GST status. It should be clear to all parties whether the buyer will be GST-registered on settlement date, as this can have GST implications for both parties.

Purchase price allocation

If GST is applicable to the transaction, you should consider whether you should agree with the other party on a purchase price allocation; completing a purchase price allocation[1] is highly recommended in some situations.

If the buyer and seller agree on a purchase price allocation in the agreement, this allocation must be used by both the seller and buyer when completing their respective tax returns. This provides certainty to both parties. The purchase price allocation can therefore have tax consequences for both buyer and seller, so it is important to get accounting advice on this allocation before signing the agreement.

Where to from here?

If GST is (or may be) applicable to your transaction, it is important that you get legal and accounting advice *before* signing the agreement. A mistake in the agreement cannot always be fixed by your professional advisers after signing; it could result in an unexpected GST bill, which can be very costly. We and your accountant will work together to ensure that the sale and purchase agreement accurately reflects your GST position and that you fully understand any potential tax consequences before signing the agreement. +

1 Purchase price allocation is where the price is allocated between the land and any buildings, and other fixtures, fittings, chattels or improvements.

Property briefs

Healthy home standards compliance from 1 July 2025

First introduced in 2019, healthy home standards are the minimum legal standards expected of rental properties in New Zealand. These include:

- Heating (provision of functioning and fixed (not portable), heaters in the main living room)
- Ceiling and underfloor insulation, and
- Adequate ventilation (functioning doors and windows, and extractor fans in the kitchen and bathrooms).

From 1 July 2025, all landlords are responsible for ensuring their rental properties comply with healthy homes standards (and continue to comply with them over time). Landlords who do not comply will be in breach of the Residential Tenancies Act 1986 and can be penalised up to $7,200 per breach. Landlords who are ignorant of these changes or disorganised will not be excused.

Landlords in new or renewed tenancy agreements must include a signed statement detailing the property's compliance with the standards. Failing to do so can result in a penalty. There are also penalties to the landlord if they provide misleading information in compliance statements.

If you are a tenant and you are concerned that your rental property does not comply with healthy homes standards, we recommend having a friendly chat to your landlord first. Failing that, please contact us and we can help you explore your options.

On the other hand, if you are a landlord and are concerned about your obligations under the healthy homes standards, please come and see us for advice.

Sunset clauses – the new bill introduced into Parliament

The Property Law (Sunset Clauses) Amendment Bill was introduced to Parliament on 9 April 2025 and is tracking towards its first reading. The bill is aimed at restricting sellers developing vacant plots of land from using 'sunset clauses' to cancel sale and purchase agreements. It also provides an extra layer of protection to buyers who, in good faith, have made the commitment to purchase the property.

In this context, a 'sunset clause' is a provision added to an agreement for the sale and purchase of a plot of land in development which allows the seller or buyer the option to cancel the agreement if the development is not complete by the specified date.

There have previously been situations in which sellers have used these clauses to cancel an agreement, where there have been delays in development, only to then go and list the property at a higher price.

This legislation would require the seller to obtain the buyer's written consent to cancel the agreement under a sunset clause. There would also be the requirement to give sufficient notice of, and reasons for, the proposed cancellation to the buyer in advance. This is the extra layer of protection given to the buyer.

If the buyer does not consent to the agreement being cancelled, the seller would need to apply to the High Court for an order permitting the cancellation. On the seller's application, the court would only make the order if it is satisfied that its making would be 'just and equitable in all the circumstances.' The court would consider various factors including whether the seller has acted unreasonably or in bad faith, the reason for the delay in completing the development, whether the land has increased in value and the effect of the cancellation on the buyer.

If this law is passed and you are a seller or buyer who seeks to activate a sunset clause, please get in touch with us – we would be happy to assist you.

Real estate agent commission – claim or not to claim?

Before a real estate agent lists a seller's property, the parties enter into a 'listing agreement' or 'agency agreement,' authorising the agent to sell the property on the seller's behalf.

The real estate agent receives a commission (a percentage of the sale proceeds) for introducing the buyer to the property. The real estate agent usually takes their commission out of the deposit the buyer pays when the agreement for sale and purchase becomes unconditional.

However, there are some situations in which an agent is not entitled to be paid their commission:

- Where there is no listing agreement in place
- If an agreement for sale and purchase does not become unconditional and is cancelled, and
- If the property is pulled from the market and the seller cancels the listing agreement (but note that the agent may still charge a fee).

If you are considering selling your property and have any questions about entering into a listing agreement, please come and see us for advice first. +

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