



Buying residential property

Inder Lynch Lawyers

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Introduction

For most people, buying a residential property will be the single largest financial decision they will ever make.

The practical realities of dealing with real estate agents, vendors, building inspectors, mortgage brokers and banks mean that buyers often don't have the time to pay attention to the legal processes behind the purchase of real estate.

At Inder Lynch, our role is to guide our clients and ensure that their interests are protected throughout their transaction, but we think that it isn't a bad thing for buyers to have a basic understanding of the legal aspects of the process. This is particularly important because so much of the folk wisdom around property law is misleading at best and plain incorrect at worst.

We wrote this guide to help demystify the jargon and explain what happens when property is bought. We will also explain the tasks that you can expect us as your lawyer to carry out and the value that we will add to the process.

Remember to have your lawyer review and approve any agreement before you sign it. Once the agreement has been signed by both the vendor and the purchaser, you will have a legally binding and enforceable contract.

Some basic definitions

What is an agreement for sale and purchase?

An agreement for sale and purchase is a contract for the sale and purchase of real estate entered into by the seller (**vendor**) and the buyer (**purchaser**).

In New Zealand, most property transactions are conducted on the standard form agreement maintained by the Auckland District Law Society & Real Estate Institute of New Zealand. Although the terms of the standard ADLS/REINZ agreement are always tailored to suit the particular circumstances of the transaction, the use of a standard form agreement helps ensure that both the vendor and the purchaser are clear about their respective obligations and responsibilities.

The agreement sets out all the relevant details of the transaction, including the parties' names, legal description and address of the property, purchase price, conditions attached to the transaction and when they must be met, and the dates for settlement and possession.

In years gone by, a printed agreement would often be signed in person and the agent would shuttle the physical document between the parties to exchange offers and counteroffers. These days, agreements are usually signed and exchanged electronically.

Once signed by both parties, the agreement becomes a legally binding contract. That's why it is essential to get legal advice before signing the agreement.

Conditions

A condition is a term of the agreement inserted for the benefit of either the vendor or the purchaser. Common conditions include:

- Finance condition
- Title approval condition
- Land Information Memorandum report condition;
- Building inspection report condition;
- Toxicology report condition.

The agreement will set out the dates by which each condition must be satisfied. If a condition is not satisfied by the specified date, then the agreement can be cancelled. When all the conditions have been satisfied, the agreement is said to have “*gone unconditional*” and the purchaser and vendor will be bound to complete the purchase.

Chattels

Chattels are items of property that can be moved and are not fixed to the land or dwelling.

The standard ADLS/REINZ agreement includes a list of chattels that are usually sold with the property, including things such as the stove, dishwasher, heated towel rail, curtains, fixed floor coverings and heat pump.

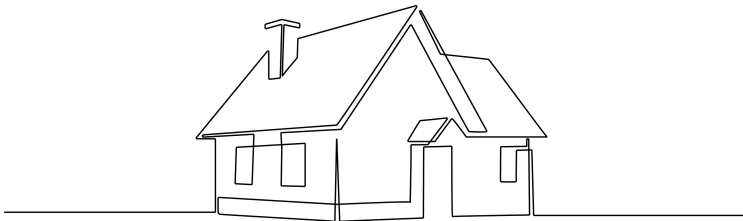
The standard list should be updated as necessary by the parties before signing to ensure that the agreement accurately records the chattels that will be included in the sale, as the vendor will only have to provide chattels that have been listed.

Purchasers should check the condition of the chattels listed in the agreement before signing and specifically note any that are not in reasonable working condition. This is because the vendor is only obliged to provide the chattels in the same condition that they were at the time of signing the agreement.

Settlement and possession dates

The settlement date is the date on which the purchaser will pay the remaining amount of the purchase price to the vendor, who in turn will transfer title of the property.

The purchaser normally also takes possession of the property on settlement, although in some cases early possession prior to settlement might be sought from the vendor.



Compliance matters

Why is my lawyer asking for my personal information?

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 requires all lawyers (and real estate agents) to gather certain information from their clients when acting on various types of transactions, including property purchases.

This means that when you are buying or selling property, you'll need to give your lawyer an acceptable form of identification together with proof of your current address. In some cases, the law also requires your lawyer to ask you for further information about the source of funds for your purchase and/or your financial position. Don't take it personally, as these are simply requirements of the law.

These requirements are not onerous but do need to be completed at the start of the engagement with your lawyer. You can help avoid delays by providing the documents to your lawyer promptly.

Am I entitled to buy in New Zealand?

The Overseas Investment Act 2005 (**OIA**) imposes restrictions on the ownership and control of sensitive New Zealand assets (including residential and lifestyle land) by overseas persons.

If you are a New Zealand, Australian or Singaporean citizen OR are ordinarily resident in New Zealand, you will not ordinarily require OIA consent to buy residential land.

For a non-citizen to qualify as ordinarily resident, they must:

- have a residence-class visa; and
- have lived in New Zealand for at least the last 12 months; and
- have been present in New Zealand for at least 183 days in the last 12 months; and
- be a tax resident of New Zealand.

Every agreement for sale and purchase must state whether or not consent from the Overseas Investment Office is required for the purchase. All purchasers must also complete a residential land statement confirming their citizenship and residency status, which will be kept on file by their lawyer. If you fall outside the citizenship/residency criteria, you will need consent from the Overseas Investment Office to purchase any land in New Zealand, and in some situations may not be able to proceed at all.

The rules for overseas buyers can be complicated and so if you are not a New Zealand citizen, you should discuss your situation with us before signing any agreement for sale and purchase of land. We will be able to advise whether the transaction can proceed or whether OIA consent or notification is required.

Types of property titles

Fee simple title

Ownership of a fee simple title means that you own the land described in that title outright and do not hold or share it with anyone else.

Fee simple titles are often referred to as “freehold” titles in common parlance, but be aware that some people incorrectly use “freehold” to also describe a property that is not mortgaged. A fee simple/freehold title is capable of having a mortgage registered against it.

The obvious advantage of a fee simple title is that it provides the most freedom to do what you wish with the land (subject only to any easements, covenants, bylaws and consent requirements). For this reason, fee simple titles are usually the most attractive to purchasers and their banks, and are priced accordingly by vendors!

Cross-lease title

Cross-leases are a form of ownership in which multiple people jointly own the same piece of land. They were originally developed by lawyers to avoid the time, expense and formalities associated with a formal subdivision.

Cross-leases are particularly common in older areas of Auckland. In a cross-lease, the owners all have an undivided share of the land and lease the dwellings to and

from each other for a period of 999 years for a nominal rent.

Separate titles are issued to each owner recording their ownership of the share of the land and referring to the dwelling which is leased.

Problems can sometimes arise with cross-leases where owners have carried out certain types of work without getting the written consent of all the other owners, or where such work is done without the title plan being updated and the record of title changed.

For this reason, more and more cross-leases are being converted to separate fee simple titles, but this can be an involved process requiring input from planners and surveyors.

Unit title

This is a form of ownership that is particularly common for newer apartment and townhouse blocks. Owners own a defined part of the building (such as a specific apartment or townhouse) and share the ownership of common areas such as driveways and entrance lobbies.

There is a separate record of title for each unit. The owners of each unit collectively make up the body corporate, which is responsible for maintaining the common areas and the building as a whole.

The body corporate is obliged to hold regular meetings of all the owners to make decisions regarding the whole property, including setting annual financial contributions by owners to cover operational and maintenance costs.

If you are interested in buying a unit title property, the vendor is required by law to provide a pre-contract disclosure statement containing certain information about the property before an agreement is signed.

We recommend that you get your lawyer to check this disclosure statement for you before signing any agreement for a unit title property.

Leasehold title

A leasehold title is a title that is issued when the land is owned by someone else (the landlord) and that landlord then leases their land to another party. The lease may be for the land only, or it may be for the land and the buildings on it.

Joint ownership of property

What is the difference between a joint tenancy and a tenancy in common?

In a joint tenancy, two or more owners each own an undivided share of the property. If one of the owners passes away, their interest in the property will pass by the right of survivorship to the other joint owner.

A tenancy in common is where two or more people own a property together in separate and defined shares which can be equal or unequal. For example, one person might own a 25% share in the property, and the other owner might have a 75% percent share. If one of the owners dies, then that person's share does not automatically pass to the other owners, and will instead be dealt with in accordance with the provisions of their will.

There are no strict rules, but joint tenancies are frequently used where married couples are purchasing properties. Tenancies in common, on the other hand, are more commonly found in de facto relationships, extended family situations or where there are business relationships that require clear delineation of specific shares.

Do I need a written agreement with my co-owners?

You might need a written agreement if any of the following apply:

- You are considering getting married or entering into a de facto relationship;
- You wish to keep this property or your contribution to it as your separate property;
- You and the other purchaser are contributing different amounts to either the purchase price or to the repayments of the loan and other outgoings;
- You are in a business relationship;
- You want a clearly defined process for the eventual sale of the property and the division of the profits.

You and your lawyer will need to carefully consider your current circumstances to ensure that the ownership structure for the purchase of the property reflects your long-term intentions.

If you are buying property with someone else, we encourage you to talk to your lawyer sooner rather than later to determine the best form of agreement. Appropriate forms of agreement could include a property sharing agreement or a contracting out agreement under the Property (Relationships) Act 1976. Co-owners might be required to seek independent legal advice regarding any proposed arrangements.

Common conditions in agreements

Finance condition

Your agreement might be conditional upon you obtaining suitable finance from a bank. Your lawyer will need to receive written confirmation from your bank or mortgage broker of the amount and the terms of the loan by the finance condition date in the agreement for sale and purchase.

Once the written confirmation is received, your lawyer will check it with you and then advise the vendor's lawyer that the finance condition has been satisfied.

It is important that any loan offer is not subject to any outstanding issues such as a valuation, verification of income or similar. If you intend to obtain finance from somewhere other than a bank, you should discuss that with your lawyer before signing any agreement for sale and purchase.

A finance condition is not a general escape clause for purchasers

If your application for finance is unsuccessful and you wish to cancel the agreement on that basis, the vendor is entitled to require you to provide a satisfactory explanation of your attempts to obtain finance together with supporting evidence.

What if I want to use my savings from KiwiSaver?

If you are a first home buyer, you may be entitled to withdraw all but \$1,000 of your KiwiSaver funds to put towards your purchase.

We recommend that you apply for pre-approval for your KiwiSaver withdrawal as early as possible in the purchase process. Once you have pre-approval, further documents will have to be signed with your lawyer, which will then be sent to the relevant scheme administrators. There are strict timeframes for processing and KiwiSaver providers require the signed documents to be sent to them at least 10 to 15 working days before the funds are actually required. Bear this timeframe in mind if you intend to use KiwiSaver funds to pay the deposit.

If you are first home buyer and intend to use KiwiSaver funds, we strongly recommend that you run any offer that you plan to make past your lawyer before signing so that they can check the finance condition allows sufficient time to complete the KiwiSaver withdrawal process.

LIM condition

A Land Information Memorandum (**LIM**) is a report from the local council containing all of the information held on the council's file relating to the property. The LIM will generally contain information on building and resource consents that may have been issued on the property, details on the property's zoning information, and details of current rates information.

Many councils will also include plans and diagrams of water and sewer connections as well as any building consent plans. The LIM will also usually contain information concerning any special features about the property (for example, whether it is in a high wind zone or underneath an aircraft flight path).

The LIM will only contain information that is known to the council. If the council does not know about an illegal structure or some other relevant feature of the property, then it will not show up on the LIM. Even with this limitation, we strongly recommend that anyone buying a property obtains a LIM and to make the agreement for sale and purchase conditional upon a satisfactory LIM being obtained.

The standard terms and conditions of an agreement for sale and purchase state that a LIM must be ordered within five working days of the date of the agreement. This can be arranged through the relevant council's website. Councils are entitled to charge for the LIM and they usually cost a few hundred dollars. There is sometimes an option to order the report on an urgent basis at a higher cost.

It is important to personally review the LIM, as you are the person who will have viewed the property in person. Whilst your lawyer is able to advise you on the LIM in general terms, it is important that you raise any concerns you may have after comparing the LIM to your viewing of the property.

It is not sufficient to rely on a LIM supplied by the vendor or their agent, as the council is only liable in respect of the information that they provide to the person who has ordered the LIM.

Building inspection report condition

A building inspection report must be from a suitably qualified person. The agreement for sale and purchase defines a qualified person and it is generally accepted that reports must be from a licensed building practitioner or a certified building inspection company or consultant.

Unless you are buying a brand new property for which there is a code compliance certificate, we usually recommend that a building report condition is included in the agreement for sale and purchase.

The report writer will usually provide a comprehensive written report on the state of the property covering everything from the foundations through to plumbing, electrical works, landscaping, compliances and exterior buildings.

The cost of obtaining a report will vary, depending on how in-depth a report is requested. You should make sure that the scope of the investigation is discussed and confirmed with the building consultant before the inspection and report is carried out.

Toxicology report condition

A toxicology report is a report obtained at your cost regarding whether the property has been potentially contaminated by the manufacture or use of illegal drugs including, but not limited to, methamphetamine.

The report must be prepared in good faith by a suitably qualified inspector using accepted principles and methods, and must also be in writing. This is because if you cancel the agreement on the basis of the findings in a toxicology report, you must provide a copy of the written report to the vendor if they request it.



Other considerations for buyers

Do I need to pay a deposit?

The amount of the deposit and when it is paid are matters for negotiation. Payment of a deposit is a sign of good faith that you will complete the purchase, as well as a part payment of the overall purchase price.

The deposit is paid to the real estate agent who is required to hold it until the agreement becomes unconditional. Always insist on a trust account receipt from the agent when you pay the deposit. On settlement, the deposit is deducted from the purchase price of the property.

If the agreement is cancelled because a condition cannot be satisfied, the real estate agent will refund the deposit to you in full. Alternatively, you may prefer to negotiate before signing the agreement to have it provide for the deposit to be paid only upon the agreement being declared unconditional.

What do I need to know about auctions?

You should get legal advice before attending an auction. This is because if you are the successful bidder at auction, the agreement that you sign will be an unconditional contract and will generally contain provisions where you waive your rights to raise any errors in the title or any other issues in relation to the property.

We recommend that you obtain the general terms of sale from the real estate agent and forward them to your lawyer, who can review and check it together with the title and the LIM report. You may also wish to obtain a valuation and a building inspection report.

There is a risk that after spending a significant sum of money on due diligence, you may end up not being the successful bidder (or the property might not reach its reserve price). That is unfortunately simply an inherent feature of buying at auction.

Even with those costs, we recommend that prospective purchasers carefully check the property before bidding at auction. You need to be armed with as much information about the property as possible so that you can make an informed decision about bidding.

What do I need to know about buying a vacant residential section?

The standard agreement for sale and purchase obliges the vendor to point out the boundaries of the property if it is a vacant residential section. In any case, if you are looking at buying a vacant residential section, it is important that you clearly identify the boundaries. If you are not sure, a surveyor should be able to locate the boundaries for you for a reasonable fee.

If the section you are considering is part of a new subdivision or development, there may well be covenants registered on the title. These covenants are usually a list of minimum building and care standards that the developer

has imposed on all the sections to ensure a certain standard and uniformity is maintained throughout the subdivision.

It is important to consult with your lawyer and have them review these covenants so that you understand the potential restrictions that may be imposed if you proceed to buy the section.

What happens before the settlement day?

Most agreements will entitle you to inspect the property before settlement to satisfy yourself that everything is in order. We strongly recommend that you take advantage of this opportunity.

If you identify any problems during your inspection, you must let your lawyer know during working hours on the day before settlement at the very latest. If the vendor's lawyer is only advised on settlement day, the vendor will not be obliged to fix any defects.

What happens on settlement day?

Your lawyer will advise you before the scheduled settlement day of the amount required from you to complete settlement.

If you are not obtaining a mortgage, you will need to arrange to have the settlement funds paid from your bank account to your lawyer's trust account before the settlement day. If you are obtaining a mortgage, your lawyer will arrange for the bank to draw down the mortgage funds into their trust account on the settlement

day. Once your lawyer has all the funds required for settlement, they will notify the vendor's lawyer that you are ready to settle.

After the vendor's lawyer has then provided the necessary undertakings and document releases, your lawyer will then transfer the settlement funds to the vendor's lawyer's trust account, and the vendor's lawyer will then notify the agent that the keys to the property can be released.

Your lawyer will then notify you that settlement has been completed and that the keys are available for collection, usually from the real estate agent's office (or as otherwise arranged). It is at that point that the actual work of moving into the property can begin!



About Inder Lynch

Inder Lynch is a full-service law firm with offices in Manukau, Papakura and Pukekohe. We have proudly served South Auckland and the greater Auckland region for over 70 years.

Our property lawyers are able to provide expert advice and guidance in relation to buying or selling residential property in New Zealand.

Contact us today to discuss how we can help you with buying residential property.



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