

PURCHASING AN APARTMENT CONTRACTUAL PITFALLS

Strong demand for apartments has seen purchasers signing purchase contracts on the basis of plans for apartments not yet constructed. Some purchasers are signing contracts with developers who do not even have the required planning or building consents for construction.

The contracts that prospective purchasers are given to sign are often custom written contracts prepared by the developer's solicitors. Such contracts will not include all of the clauses found in the standard form NZLS/REINZ contract usually used for purchasing property. Purchasers should get legal advice on such contracts before signing, or make the contract conditional upon their solicitor's approval.

Some of the issues to watch out for if you are buying an apartment from the plans or on a non-standard contract form are:

- **Deposit** – how much is it (10% should be the maximum for an apartment not yet constructed); when is it payable and who to (when the contract is formed, or when it is unconditional); and most importantly, when can the developer get access to it? If the developer can access the deposit before they have development finance and the necessary planning consents, there is a chance the deposit could be lost if the development does not proceed. Generally the deposit should be held in a solicitors or real estate agents trust account until settlement. Any interest earned on the deposit should be credited towards the purchase price.
- **Sunset Clause** – it is common for the contract to be conditional upon the developer fulfilling a number of conditions, for example obtaining a building consent by a certain date. Sometimes the satisfaction date can be sometime off, or even the day before settlement. If that is the case, then a purchaser should include a sunset clause in the contract, which allows them to cancel the contract if the developer has not satisfied its conditions within a reasonable time, say one year from the contract being formed. Otherwise the purchaser will have to wait to settle while the developer satisfies its conditions. The purchaser should have the option to cut its losses, obtain a refund of the deposit and look for a new property.
- **Communal Facilities** – developers sometimes add to the attractiveness of apartment developments by including communal facilities such as swimming pools and gyms. Make sure that the contract actually requires the developer to provide these facilities or allows you to reduce the price or cancel the contract if they don't.
- **Changes to Plans and Specifications** – if you are buying an apartment on the basis of plans and specifications, it is important that the developer actually builds what is shown on the plans. Sometimes the developer will not be able to use the exact materials specified, in which case they should consult with the purchaser and pass on any cost savings. However, if the developer wishes to make material changes to the plans, for example changes that affect the value, position or use and enjoyment of the apartment, then the purchaser should be able to re-negotiate or cancel the contract and have their deposit returned.
- **Settlement** – the developer should allow the purchaser to make a pre-settlement inspection, and should provide a copy of the Code Compliance Certificate before settlement. Many mortgagees will now require a final Code Compliance Certificate to issue before advancing settlement proceeds to your solicitor.

The Building Act 2004 is going to change some aspects of conveyancing practice. Interim Code Compliance Certificates will no longer be available as from 31 March 2005. This is potentially of huge significance to developers of multi unit developments who, after 31 March 2005, will have to wait until all units are completed before obtaining a Code Compliance Certificate.

- **Maintenance Period** – the contract should provide for a maintenance period. This is a period after settlement when the developer has to fix any faults in construction for no charge. The maintenance period should be at least 90 days so that the purchaser has time to discover the faults and to observe the apartment in various weather conditions.

- **Maintenance Retentions** – once the developer has settled the sale, there is no real incentive to attend to maintenance items. One way to provide an incentive is for the purchaser to retain some of the purchase price, say 5%, and only pay it to the developer when all the maintenance items have been rectified.

- **Unit Title Issues** – nearly all apartment developments are developments under the Unit Titles Act. The Act provides for owners of unit title properties to pay a levy (called a body corporate levy) to cover costs such as insuring the structure of the development and maintaining common areas. Body corporate levies are in addition to local body rates. In some cases, body corporate levies can be considerable. There is also the possibility of one-off levies to cover unexpected costs, for example, replacing worn out lifts. It is a good idea to ask the developer for an estimate of the body corporate levies and a break down of them. Watch out for unreasonable management fees, which are sometimes payable to a management company related to the developer. The levy should also include a contribution to a reserve fund to cover unexpected maintenance costs.

- **Body Corporate Rules** – the Unit Titles Act requires unit title developers to be governed by body corporate rules. These rules deal with the running of the residents committee (called the body corporate committee), voting, meetings, payment of levies, etc. However they also deal with use of apartments and wider issues such as the keeping of pets, noise, alteration and decoration of apartments, use of carparks, and many other day to day issues. The body corporate rules will affect how purchasers use their apartment. A prospective purchaser should be given a copy of the proposed body corporate rules and have their solicitor consider them before the purchaser is bound to purchase. The contract should also prohibit unilateral changes by the developer.

There are many other issues to be considered when purchasing an apartment, whether from the plans or one already constructed. It is definitely worth getting legal advice before entering into a binding commitment to purchase.

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