

Common Pitfalls of Buying Off the Plans

There are strong demands for houses/apartments in New Zealand and there purchasers signing purchase contracts on the basis of plans for houses/apartments not yet constructed. Some purchasers are signing contracts with developers who do not even have the required planning or building consent 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 property from the plans or on a non-standard contract form are:

- 1. Read the Agreement** - Take your time to read through all the relevant sections and conditions. Seek legal advice BEFORE signing. Be careful of verbal agreements!
- 2. Deposit Payment Dates** - This will be a key feature of the agreement and the vendor will of course be negotiating to ensure payment of deposit as early as possible while the purchaser would want payment upon unconditional or certain progress done. The most important thing is whether or not the developer has access to the deposit prior to settlement. If the developer can access the deposit before they have development finance or the necessary planning consents, there is a risk of losing the deposit if the development does not proceed. It is therefore wise to therefore make payments in stages and always ensure you pay to a stakeholder such as an agent or solicitor's trust account. Any interest earned on the deposit should be credited towards the purchase price.
- 3. Sunset Clauses** - This will often be the key clause for purchasers to put a limitation on when settlement, practical completion and/or CCC can be issued. This ensures a way out for purchasers if the project is not completed by a certain date.
- 4. Material Differences Clause** - Often vendors will insert a clause discharge them from any obligations on the vendor to keep to the proposed floor plans or car park plans. This can have an adverse effect particularly with the area of the unit size so prospective purchasers should negotiate a clause warranting compensation if say there is a decrease in the unit area by more than 2% (often this is increased to 5%). If you wanted to protect the car park plan as you had a particularly good car park spot or did not want another spot, you should also be mindful of protecting this too.

- 5. Specifications List** – Ensure a thorough list is obtained and included in the agreement. Often there will be clauses inserted by the vendor stating that if the same one is not available, they will reserve their right to provide alternative models, but as a prospective purchaser you want to essentially ensure they substitute like for like. You also want to ensure for example that the polished wooden floors you have been orally promised are included in the list because if not, you will not be legally entitled!
- 6. Communal Facilities** - Developers sometimes add to the attractiveness of the property (more common in apartments) by including communal facilities such as swimming pools and gym. 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.
- 7. Possession / Settlement Date** – This will often be tied into the practical completion and Code Compliance Certificate (“CCC”). Be aware that you cannot allow members of the public into a unit upon practical completion before a CCC is issued so you cannot rent out the unit etc until the CCC is issued. Also be aware that risk passes with possession so we would never recommend taking possession before settlement date, but if you do, get insurance!
- 8. Cancellation Clauses** – It is very important to insert such cancellation clauses if certain stages are not reached by a certain date. Often this is missed especially when clients sign the agreement before obtaining legal advice and you could find yourself in an awful position of just waiting for the developer to lodge the building consent, or start the works, or move to the next level, or complete the project with no bargaining power if you get into this uncomfortable position.
- 9. Staged development controls** - It is highly recommended you have staged developments as a part of a condition warranting a right to cancel if the condition is not satisfied. Such stages could include applying for subdivision/ resource consent, lodging building consent, obtaining building consent, starting the works on the floors, starting the works on the roof, reaching practical completion and obtaining CCC. We would also recommend holding back a bond or final payment until CCC is obtained.
- 10. Defects Liability Period** – The Building Amendment Bills are moving towards making a 12 months defects liability period mandatory for all building works so owners can hold the builders accountable to any defects they find during this period. Hence this period is highly recommended and we would further recommend holding back a bond until this period lapses to further provide assurances that the builder will in fact attend to the requested works.
- 11. Finance** - It is often difficult to rely upon bank finance to do a long term off the plan purchase so be very careful if you are relying upon bank or third party finance!

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