



Sam Williams

To Settle or Not to Settle – That is the Question

In the context of a falling market, anecdotal evidence suggests that some buyers are electing not to settle transactions where they perceive that the underlying value of the subject property no longer “stacks up” when compared to the purchase price under the contract. This is particularly so in the case of speculative investments in sections and apartments.

The consequences of doing so can be significant.

Most residential and commercial property transactions in this country are transacted using the Auckland District Law Society’s standard form Agreement for Sale and Purchase of Real Estate (“Agreement”).

Clause 9.1 of the Agreement states that in the event of failure by the buyer to settle, the seller may issue a Settlement Notice. The buyer then has 12 working days within which to settle the transaction. Failure to settle within that time frame gives the seller the right to cancel the contract or sue the buyer for an order of Specific Performance. An order for Specific Performance is a Court order which requires the buyer to perform his/her obligations under the contract.

Where the seller elects to cancel, his/her rights are set out in clause 9.4(b) of the Agreement, and are as follows:

- Forfeit and retain for his/her benefit the deposit, up to a sum equivalent to not more than 10% of the purchase price; and/or
- Sue the buyer for damages.

Clause 9.4(3) of the Agreement states that the damages recoverable by the seller will include any loss incurred by the seller on a bona fide resale contracted within one year of the date on which the buyer should have settled under the Settlement Notice. The loss may include:

- Interest on the unpaid portion of the Purchase Price from the settlement date to the date of settlement of the resale;
- All costs and expenses reasonable incurred in any resale/attempted resale; and
- All outgoings (other than interest) on or maintenance expenses in respect of the property from the settlement date to the date of settlement of the resale.

The main ingredient of the seller's loss is in most cases the difference between the purchase price under the original contract and the purchase price achieved by the seller on resale. The seller's loss on resale can therefore be significant, especially in a falling market. For that reason, buyers should think long and hard before deciding that they are better off not settling.

This article is of a general nature and is not a substitute for legal advice. If you require advice in respect of a real estate transaction, please contact Sam Williams at Norris Ward McKinnon.

Contact Details:

Sam Williams
Commercial Business Team
DDI: (07) 834 6028
Fax: (07) 834 6100
Email: sam.williams@nwm.co.nz

NORRIS WARD MCKINNON
L A W Y E R S