

We hope you find the articles both interesting and useful in this Summer edition of *Property Speaking*.

To talk further about any of the topics covered in this e-newsletter, please don't hesitate to contact us – our details are above.



Property Owners Should Get All their Ducks in a Row

Make sure you have a will and EPAs

You work hard to build up your assets over your lifetime, so you should decide what happens to them if you become incapacitated and when you die. If you own property, having a Will and Enduring Powers of Attorney (EPAs) will ensure all your affairs are in order and make things easier for your family and business colleagues.

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Don't Rush into Signing an Agreement for Sale and Purchase

Always wait to get legal advice

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You will all no doubt know the purpose of a Will. A Will records your wishes as to what happens with your property when you die, and who is to take care of it.

We strongly recommend reviewing your Will every five years, and when there are significant changes in a relationship, such as marriage, entering or ending a significant relationship.

If you don't have a Will?

This is known as dying intestate, and means your property will be distributed in accordance with the Administration Act 1969. Your property is likely to go to your spouse/immediate family, but that may not be exactly what you or other family

members wish. Dying intestate is also likely to increase the chances of a claim being made against your estate, and therefore incurring significant costs.

What is an EPA?

Having an EPA allows someone (an attorney) to help look after your affairs, manage your property and make decisions about your welfare if you are unable to do this. Your attorney doesn't have to be your lawyer; it could be a family member, a trusted advisor or a close personal friend. An EPA differs from a general power of attorney as it allows the attorney to act for you if you become too unwell to make decisions for yourself, or what's called 'mentally incapable' in the professional opinion of a health practitioner.

There are two types of EPAs – a property EPA, and a personal care and welfare EPA.

EPA in relation to property

A property EPA gives the attorney the power to manage not only your property (as in real estate), but also your bank accounts, shares, businesses, debts and so on. You don't necessarily have to give the attorney unlimited power; you can restrict your attorney's ability to only deal with certain matters.

You also have the choice whether your property EPA takes effect while you are mentally capable (as well as mentally incapable). This can be handy if you need

someone to deal with your affairs while you are out of the country, or you just no longer want the day-to-day hassle of paying bills, etc. You also have the right to appoint more than one property attorney.

EPA in relation to personal care and welfare

A personal care and welfare EPA gives your attorney the power to make decisions on matters such as ones concerning your medical treatment or whether you need to go into a rest home.

Unlike the property EPA, the personal care and welfare EPA will only take effect when you are mentally incapable. As well, you can only appoint one attorney. You can, however, state that your attorney has the duty to consult with family members, but the final decision will rest with your attorney.

We recommend appointing a 'successor attorney' to act as a substitute in case your attorney is unable or unwilling to act for any reason.

Who to ask?

Your attorney/s must act in your best interests and protect your welfare. As you are giving considerable power to them, it pays to think carefully about who you appoint beforehand (as well as discussing it with them first). You can change attorneys at any time while you have mental capacity and appoint replacements.

Your EPAs cease when you die, and those powers then vest in the executors named under your will.

If you don't have EPAs?

Not appointing attorneys before you are considered mentally incapable can be a costly and lengthy process. An application is made to the Family Court, but that doesn't always mean the court will appoint who you would have wanted to look after your affairs.

We recommend everyone over the age of 18 should have a Will and both EPAs, so it's never too early (but it can be too late) to get these organised. Having these ducks in a row will save your loved ones the hassle and the cost at what will be a difficult time. ■



Don't Rush into Signing an Agreement for Sale and Purchase

Always wait to get legal advice

Buying a house – on a stress scale of 1 to 10 (10 being the worst) – is said to be an 11. You have viewed numerous houses, taken off your shoes at every single one of them as you traipse through living rooms, kitchens and bathrooms, and agonised and argued over which house to buy. Now comes that important decision – to sign or not to sign?

You're then presented with an agreement for sale and purchase, which is possibly one of the most important documents you will sign. In these days of escalating property prices and short supply, there's often pressure to sign without your lawyer's input, with no due diligence clause and often it is an unconditional offer. Once you sign the agreement, you are committed to the purchase.

You can, however, be prepared before you sign the agreement. Talk with us when you're starting to look for a new property and we can help you with the drafting of some clauses; two of which we discuss below.

Equitable set-off

Clause 8 in the standard agreement covers claims for compensation by way of what's called equitable set-off (ESO). An ESO situation can arise after a purchaser's pre-settlement inspection, which is usually done two or three days before settlement.

Here's a real life ESO example. The purchaser carried out a pre-settlement inspection and noticed a locked cupboard in the house. The vendor said he was growing cucumbers. The purchaser had her suspicions that the vendor was growing cannabis, which turned out to be the case. A claim for compensation was lodged by way of an ESO for in excess of \$100,000 to pay for decontamination.

The timing of an ESO claim is critical. If there's no settlement notice in place, the claim must be made on or before the last working day before the settlement date in

the agreement. It's not, as is so often the case, on the day of settlement. Any claim must be genuine and realistic. You should not, for example, claim \$5,000 because the back porch is dirty.

We recommend you carry out the pre-settlement inspection a few days before settlement, not early on the day of settlement. If you make an ESO claim, we need a reasonable opportunity to sort it out before settlement.

And following up the cucumber claim, happily – for the vendor – it was sorted out by settlement date as the purchaser withdrew her claim.

Solicitor's approval clause

Some people believe that having a solicitor's approval clause in their sale and purchase agreement is as good as a due diligence clause. It is not.

A solicitor's approval clause is useful where there *is* a genuine legal objection or impediment to the sale, such as the validity of the title. This clause can be for the

benefit of the vendor or the purchaser – if there are genuine reasons to use this clause.

The clause is less than useful if you want to cancel the agreement because you made a bad decision.

A true life example of how this clause works follows. A purchaser put in an offer on a house on a Saturday before a Sunday open home. The vendor insisted on a standard solicitor's approval clause, for her benefit, and both parties signed. More than 200 people came to the Sunday open home. The vendor realised, with horror, that she could have got \$100,000 or more than the agreed sale price and attempted to cancel the agreement on the basis that her solicitor did not approve it. One caveat and a flurry of letters later the vendor accepted the inevitable and the deal went ahead. The fact that the vendor had changed her mind was not enough to invoke the clause to enable her to get out of the agreement.

In conclusion, read your agreement before signing and don't be persuaded to sign anything you're unsure about. Most importantly, however, talk with us before signing, not after. ■

Property Briefs

Meth testing in a property – from a vendor's perspective

Following on from the last edition's article on P-contamination in residential property, we take the opportunity to focus on this issue from a seller's perspective.

It's now common in sale and purchase agreements to include a clause which allows a purchaser to test for methamphetamine (known also as P) contamination. This clause allows the purchaser to cancel the agreement if the property shows signs of methamphetamine use or manufacture.

The Ministry of Health's guidelines (click [here](#) to read them) state the P-contamination level that is considered unsafe.

Standards of testing vary between testing companies; many of the tests simply show a 'present' or 'not present' result. There is no way to know if those tests exceed the Ministry's safe level or not.

Let's think of an example: Your family holiday home is rented out a few times a year, and then you decide to sell it. The agreement is subject to a meth test. The test comes back positive, and your purchaser cancels the agreement.

It seems overly harsh in this situation to lose the sale, but this is the reality of a standard meth test clause in a contract. The meth test may not be laboratory tested by professionals working towards a set of unit standards.

If your purchaser insists on a meth test, don't rely on a standard meth test clause. It's better to talk with us beforehand to get a more rigorous meth test clause that must adhere to the Ministry of Health's guidelines on contamination levels. It may help you save your sale. ■

Multi-offers on a property

A shortage of property for sale has resulted in the rising trend of properties only being

available to purchase through a multi-offer situation. This is a confusing and stressful situation, particularly for first-home buyers.

A multi-offer sale is where more than one purchaser makes an offer to buy a property. Each potential purchaser has to prepare their offer and submit the offer by a deadline. The vendor and real estate agent will then review all the offers they have received and pick which they wish to accept or with whom to negotiate further.

A multi-offer situation is almost like a tender, except that there are no vendor's terms and conditions of tender and the purchaser sets their own terms and conditions. A purchaser has no opportunity to negotiate initially and must put their best offer forward in relation to price, conditions and settlement date. The higher the price and fewer conditions, the more attractive the offer looks to the vendor.

The nature of the multi-offer scenario and the very tight property market often results in purchasers leaving out important conditions in the agreement (that are there for their benefit) and overstressing themselves with their offer price. This is, potentially, a risky place to be.

If you are purchasing a property that's in a multi-offer situation, talk with us early so we can advise you of your risks and how to minimise them. ■

Terminating a commercial lease for unpaid rent

Prior to the Property Law Act 2007 coming into force, commercial landlords could seize a tenant's property to recover unpaid rent. This is no longer an option. The rules in the Property Law Act must be followed if landlords wish to terminate a commercial lease if their tenant is behind in their rent payments.

The Property Law Act – in this respect – is a code, which means its rules must be followed.

Often we see situations where commercial landlords have become so frustrated with their tenant's continued failure to pay the rent that they take matters into their own hands and revert to the previously acceptable position of taking possession of the premises and seizing chattels.

While having a tenant in your premises not paying their way can be incredibly frustrating, you can make it worse for yourself by doing this. The Property Law Act contains remedies for tenants if landlords breach the legislation.

If your tenant is behind with the rent, contact us as soon as the rent becomes overdue. We can advise you on the correct way to remedy the situation without putting yourself at risk. ■

