



## CONDITIONAL AGREEMENTS

### Background

Mr and Mrs Fleming owned a house at Beachlands, South-East of Auckland. They signed a conditional contract to buy a lifestyle block near Whangarei, owned by the trustees of the Mana Trust. One of the conditions of the contract provided that the Flemings had 90 days to enter into an unconditional agreement for the sale of their Beachlands property.

The Flemings failed to secure a contract for their house within the 90 day period. They therefore considered the contract with the Mana Trust to be at an end. The trustees disagreed. In due course, the trustees found an alternative purchaser for their block. However, the purchase price was less than the amount the Flemings had agreed to pay.

The trustees successfully sued the Flemings for the difference between the contract price and the eventual sale price (approximately \$100,000) together with interest (approximately \$225,000) and costs. The interest exceeded the damages, due to the length of time between the settlement date of the original agreement with the Flemings and the date of judgment some two and a half years later. Interest was calculated at the rate specified in the agreement of 14%.

### The law

The agreement for sale and purchase between the trustees and the Flemings included a provision requiring the Flemings to 'do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment'.

The question for the Court was whether the Flemings had tried hard enough to sell their Beachlands home. Had they done 'all things which may reasonably be necessary'? Unfortunately for the Flemings, the Court found that they had not and were therefore in breach of contract. The requirement to take reasonable steps to fulfil any condition eg to obtain finance or sell your house etc, is generally implied by the courts. The Court of Appeal described the clause in the Flemings' contract as making explicit what had previously been implicit.

This means that in most conditional contracts to buy and sell property there is an express or implied obligation to take all reasonable steps necessary to satisfy any conditions. Without such a requirement, a party could use a condition to avoid their contractual obligations simply by taking no steps to satisfy the condition and allowing the contract to lapse. This would effectively undermine the certainty of the contract for the other party.

### The problem

The Court found that the Flemings had behaved unreasonably when they adopted an unconventional approach to marketing their house by using covert strategies. This involved minimal marketing and, although there were discussions with real estate agents, there was no formal listing. The main reason the Flemings adopted the low profile marketing approach was concern about the effect the sale of their house might have on their local lawn mowing business.

However, when the Judge weighed up the importance of protecting the lawn mowing business against the obligation to attempt to sell their house, he concluded that there was an obligation on the Flemings to take a much more proactive approach to achieving a sale of their house.

### Conclusion

If you sign a conditional contract to buy a residential property, you need to be aware that you must be proactive and do all things reasonably necessary to ensure the conditions are fulfilled within the permitted time frame. There is no set formula as to what is reasonable. It will depend on the circumstances of each contract. However, to avoid the problems faced by the Flemings, discuss the steps you are proposing to take to satisfy the conditions with us at an early stage.

For more information, please contact one of our offices.

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