

MURDOCH PRICE

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NEWSLETTER

Spring 2012

INSIDE THIS EDITION

LAWYERS SELLING REAL ESTATE	1
JOINT TENANCY vs. TENANCY IN COMMON	2
ABOLITION OF GIFT DUTY AND THE IMPACT ON TRUSTS.....	3
MORTGAGEE SALES	3
NEW STAFF SOLICITOR	4
KEEPING IN TOUCH.....	4

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MURDOCH PRICE REALTORS LAWYERS SELLING REAL ESTATE

Under Section 7 of the Real Estate Agents Act 2008 Lawyers are now permitted to sell real estate.

We at Murdoch Price Limited have been engaged in selling real estate for clients for only a short time with significant success.

We offer a personal and complete service for clients at a considerably reduced cost as we do not charge on a commission basis.

We have employed a real estate professional with 20 years experience and a real estate consultant to assist in the selling process

How does it work?

Your usual Murdoch Price legal advisor will introduce you to our real estate team or you can contact our real estate consultant direct.

We will discuss your requirements, any legal or other issues affecting the property, and how to ready the property for sale

With assistance from our real estate professional you will choose the marketing plan suitable for your property which may involve signage, newspaper advertising, internet and open homes, and if appropriate auction sales or tenders.

What you pay

- Pre-agreed marketing plan costs
- Real estate selling fee (payable only if the house is sold)
- Usual legal conveyancing costs from the date a sale agreement is signed

Continued over

Why come to us?

- You know and trust your lawyer
- We offer integrity, honesty and a fair fee
- We address legal issues at the outset
- We do not charge a commission based on the sale price
- We charge a fixed fee – considerably less than usual real estate agency commissions.

More information

View our website www.murdochprice.co.nz for more information about the selling process

OR contact our real estate consultant Barbara Voulk:

Phone: 271-5880 ext. 216
 Mobile: (021) 215-1099
 Email: Barbara@murdochprice.co.nz

OR our real estate professional Kim Hemus:

Phone: 522-2419
 Mobile: (021) 838-411
 Email: Kim.hemus@acres.org.nz

JOINT TENANTS VS. TENANTS IN COMMON

In New Zealand, when purchasing a property personally with another party you can choose to own the property as Joint Tenants or Tenants in Common.

Deciding which form of ownership to use depends entirely on your personal circumstances. The differences between Joint Tenants and Tenants in Common are explained briefly below.

JOINT TENANCY

Joint tenancies arise when two or more people ('joint tenants') buy a property together and their shares in the property are undivided and undefined.

One important feature of a joint tenancy is the right of survivorship. This means that when one of the joint tenants dies, their share in the property will transfer to the surviving joint tenant(s). The interest in the property therefore is not available for disposal under a Will or under an intestacy.

Joint Tenancy ownership is most commonly seen in purchases by a husband and wife who intend on owning the property equally and passing their share to the survivor in the event of death.

TENANTS IN COMMON

Tenancy in Common allows for owners to hold a distinct share of a property. There is no requirement that a Tenancy in Common must result in equal shares of ownership. The amount of a person's interest in the property will most likely be recorded on the title, for

example: "Mark Smith as to a 1/3 share and Jane Brown as to a 2/3 share".

One major advantage of owning property as a Tenant in Common is that the owners are able to dispose of their share in the property in accordance with the terms of their Will. If a person does not have a Will, their share in the property will be distributed in accordance with the provisions of the Administration Act 1969. It is therefore important that owners have a valid Will in place that clearly sets out how the property is to be dealt with after their death.

SEVERANCE

A Joint Tenancy can be severed unilaterally to become a Tenancy in Common. This may be opportune in the event of bankruptcy of one of the joint tenants or the breakdown of a relationship. Where a relationship ends, it is often crucial that an existing joint tenancy is severed to prevent a share of the property being transferred to an ex-spouse in the event of either spouse's death prior to resolution of relationship property matters.

Severance can be advantageous when considering eligibility for residential care subsidies as only half the property is valued as an asset. See the article in this newsletter on the abolition of gift duty.

SUMMARY

For couples wanting to buy a property together, it is important to consider the effect each type of ownership will have on them. Relationship property and family protection implications are significant. It may be an option to enter into a contracting out agreement under the Property (Relationships) Act 1976 or a property sharing agreement to set out more detailed terms and provisions regarding the ownership of the property.

ABOLITION OF GIFT DUTY AND THE IMPACT ON TRUSTS

The abolishment of gift duty in October last year has changed the nature of asset and estate planning by making it possible to gift unlimited amounts directly to a trust in one transaction. There are however, certain consequences that donors (people making a gift) need to be mindful of when considering the amounts they wish to gift. Some of these are discussed below.

RESIDENTIAL CARE SUBSIDY ENTITLEMENT

Despite the changes to gift duty, the eligibility requirements for a residential care subsidy have remained the same. One of the eligibility tests for a means assessment is that the donors do not deprive themselves of assets for the purposes of qualifying for a residential subsidy. Deprivation of property includes:

- gifts in excess of \$6,000 per year in the five year period prior to applying for a residential care subsidy, and
- gifting that exceeds \$27,000 in any 12 month period prior to the five year period.

If you wish to avoid jeopardising your eligibility for a residential care subsidy, the amount gifted per year will need to be calculated carefully.

Consideration can also be given to severing the joint tenancy ownership of a house to tenants in common in equal shares. This together with changes to your Wills can reduce the value of the house by one half for the purpose of the means assessment.

SOLVENCY AND CREDITOR PROTECTION

The ability to gift unlimited amounts at any time provides donors with a greater degree of creditor protection than before. However, donors should be aware that any gifts that are made with the intention to defeat creditors can be set aside at any time under the Property Law Act 2007.

THE DARK SIDE OF MORTGAGEE SALES

While our economy recovers from the recent global recession, signs of economic lags continue to make its presence felt through increasing numbers of mortgagee

sales. Figures reveal that by November last year, 1,535 properties were brought to market as mortgagee sales

Assessing the solvency of a donor at the time of gifting is also important in the event of a donor becoming bankrupt. Under the Insolvency Act 2006, a gift may be cancelled if it was made within the two years immediately prior to the donor's bankruptcy (Section 204). If a bankrupt donor is unable to pay their debts, any gifts made between two and five years immediately before bankruptcy may also be cancelled (Section 205).

A donor wishing to preserve their entitlement for a residential care subsidy who also desires to protect their assets faces a tricky conundrum. Gifting large amounts/assets to a trust may jeopardise a donor's entitlement for a residential care subsidy. Certain balances must therefore be struck to achieve the intended outcome.

ACCESS TO TRUST ASSETS

Under the previous gifting regime, transferring an asset to a Trust usually created a debt which was written off over a period of time. The debt was an asset of the transferor, and could be called upon at any time by the donor if they needed access to funds. Gifting an asset in its entirety on the other hand has the effect of a donor relinquishing complete control over that asset. You cannot simply 'unwind' the gift. In this regard, adhering to traditional gifting regimes and leaving a loan outstanding in relation to the asset may give some donors greater leverage and will assist in ensuring that there are monies available to the donor personally if needed.

SUMMARY

There are numerous other considerations that a donor should be aware of before any significant amounts are gifted. The impact of gifting on relationship property and family protection for example, are two such considerations. It may be wise to discuss your goals with your usual Murdoch Price advisor to assess how best to achieve them.



DIFFERENCES IN AGREEMENTS

Agreements used in mortgagee sales usually differ from standard Sale and Purchase of Real Estate Agreements whereby amendments are made to greatly favour and protect the mortgagee. For mortgagee sales, vendor warranties that are contained in standard agreements are usually removed, as is the obligation to provide vacant possession. There have been cases where previous owners or tenants have refused to vacate the property even though it has been sold. In such situations, the issue of removing unlawful occupiers becomes the new owners' problem.



REMOVING UNWANTED OCCUPIERS

The options for removing unwanted occupiers include obtaining and enforcing a trespass notice pursuant to the Trespass Act 1980 and/or a possession order pursuant to the Residential Tenancies Act 1986 ('the Tenancies Act'). Section 65 of the Tenancies Act provides that a legal owner of a property can apply to the Tenancy Tribunal for a possession order that can then be enforced to evict unlawful occupiers. While in theory the process seems straightforward, the reality remains that whilst the buyer is obtaining a possession order, the risk of the property being damaged by the unlawful occupants is significant.

PROTECTION AGAINST DAMAGE

Mortgagee sales often leave behind disgruntled mortgagors (previous owners) and it is not uncommon for properties to be vandalised after the mortgagee has sold the property and prior to possession. Obtaining insurance cover for the property upon signing the agreement for its purchase is therefore highly recommended. If purchasing at auction, insurance should be arranged before bidding so that insurance cover is effected immediately upon the sale taking place.

CHATELS

It is important to note that chattels (such as stoves, light fittings, curtains and carpet) are not included in mortgagee sales. This means that the previous owner is well within their rights to remove such items from the property, as they retain ownership of the chattels despite the mortgagee sale.

CONCLUSION

The lesson here is simple - know the terms of a mortgagee sale well and be aware of the risks. There are numerous other matters that a buyer should be conscious of beyond those discussed above. It would be wise to consult a lawyer prior to signing the purchase agreement - particularly when dealing with unit titles or cross leases. Doing so may prove a worthy investment considering the potential headaches it could save in the future.

WELCOME TO OUR NEW STAFF SOLICITOR

We welcome Richard Brown who joins us as Senior Staff Solicitor. Richard is also qualified as a solicitor in England and Wales and has many years of experience advising small and medium businesses on a wide variety of legal matters.

Richard lives in Beachlands with his wife and family and is an avid runner.

He is keen to advise clients who are buying and selling businesses, taking leases or on more complex property matters. If you would like any assistance in one of these areas, why not give him a call or email? Phone Ext 205 or email Richard@murdochprice.co.nz



KEEPING IN TOUCH – SEND US AN E-MAIL

Our records of your contact details can fall behind. In particular if we have not had any recent transactions with you or changes in our software programmes can sometimes affect the information we have stored.



Email addresses are an important way we can send you general information as to legal developments that may affect you and also our newsletters if you are on our mailing list.

Send us an email indicating the email address you prefer for communications from us and we will check and if necessary update our records. No harm in adding your other contact details and we will check and update those as well. Email info@murdochprice.co.nz or to your usual contact at Murdoch Price.