



Shiree Blackwell

What Are You Signing? Be Aware Of Your Obligations Under A Conditional Contract

Shiree Blackwell, solicitor, from the Hamilton Lawlink firm of Harkness Henry & Co, reviews a recent High Court decision highlighting the importance of your contractual obligations when buying or selling property. Shiree also provides advice on working with your lawyer to ensure you avoid the pitfalls of a conditional Sale and Purchase agreement

The laws of New Zealand are intended to provide contracting parties with certainty as to where each party stands once the contract is formed. In residential property transactions, it is common for purchasers to make their contractual obligations conditional upon certain things occurring (eg arranging satisfactory finance or the sale of an existing property).

In these situations, the law requires that the party for whose benefit the conditions have been included do all things that may **reasonably** be necessary to enable those conditions to be satisfied by the due date. This general obligation at law is generally reinforced by a specific special condition in most standard form contracts.

This obligation provides a degree of certainty to the contract. Without it, one party would be bound by the contract and the other who had conditions for their benefit, could avoid the contract at their discretion, effectively turning the contract into an option.

A recent High Court decision (*Mana and Jury v Fleming*, HC Whangarei, 17 October 2006) is an illustration of this contractual requirement. The Court was asked to review whether the purchaser had made sufficient effort to satisfy a condition or had merely used the contractual conditions as a means to get out of the contract.

THE CASE

Mr and Mrs Fleming ("the Flemings") entered into an agreement to purchase a property in Whangarei from the Mana Trust. The agreement was conditional on the Flemings entering into an unconditional agreement for the sale of their property at Beachlands (Auckland) on terms and conditions acceptable to the Flemings within 90 days.

At law and under the contract, the Flemings were under an obligation to make reasonable efforts to sell their property within that 90-day period.

The Flemings carried out some work on the property in preparation for sale and contacted a real estate agent in the area but did not list the property with that agency. The Flemings were concerned about the effect a public intention to sell would have on their lawn mowing business and therefore specifically prohibited advertisement of their property and undertook what is known as a "silent" or "covert" listing. They relied on word of mouth to find prospective buyers. On a few occasions the Flemings put up "For Sale" signs at their property during the weekends that they were home. However, the Flemings were relying on a neighbouring sale and the marketing for that property to bring prospective purchasers into the area.

Towards the end of the 90-day period the Flemings received two offers for the property. However, those offers were not on terms acceptable to the Flemings.

At the conclusion of the 90-day period no unconditional offer had been accepted by the Flemings and they relied on the failure of the conditions to cancel the contract. The Mana Trust did not accept this, and ultimately resold the property at a loss.

THE OUTCOME

The Court concluded that the Flemings had not made reasonable efforts to obtain an unconditional sale of their property. Justice Williams considered that there is no fixed rule as to what

"reasonable efforts" is but that it should be determined objectively. His conclusion in this case was based on the following key findings:

- although the Flemings initially made efforts to sell the property they did not do enough over the entire 90-day period;
- the covert method of sale with minimal marketing, advertising and non-use of real estate agents is not the conventional means of selling a home;
- the method of sale may have been acceptable if the Mana Trust were not under a contractual obligation to sell (ie the property was tied up during the conditional period, preventing any other sale of the property). But "such an approach is not objectively reasonable for persons under such a constraint";
- the Flemings had an unreasonable view of the value of their property that meant that they declined two offers; and they also declined a cash offer on the basis of personal history with the prospective purchaser (Mr Fleming's brother).

Justice Williams awarded the vendors the difference between the sale price to the Flemings (\$860,000) and the sale price to the subsequent purchaser (\$777,000) plus interest at 14% and costs.

It is important to note that the following factors affected the Flemings approach to the sale:

- they thought that their property was worth more than it was;

- they were dubious as to whether the offer from Mr Fleming's brother was at fair market value and tried to protect themselves against being cheated;
- they were concerned to maintain their lawn mowing business and income in case the purchase did not go through;
- they relied on prospective purchasers going to Beachlands and did not pull them in through advertising and marketing;
- family illness.

This case highlights the importance of the obligation to do all things reasonably necessary to fulfil a condition for your benefit by the due date notwithstanding particular circumstances that might apply. The case affirms the legal requirement that, as contracts are an important part of our society, contracting parties must fulfil their obligations even in the face of difficult circumstances.

CONSEQUENCES

What could have been done to ensure that this obligation was fulfilled?

1. A proposing purchaser should ensure that it discusses with its solicitor what its intentions are regarding the sale of its own property before any contract is signed to purchase another property. This will enable the solicitor to identify any potentially unique circumstances relating to the sale.

For example, an intention to sell solely on trademe.co.nz may not be considered a reasonable sale method once the vendor is under a contractual obligation to sell.
2. The solicitor can then ensure that appropriate provisions are included in the sale and purchase agreement to permit any unconventional sale method.
3. All parties should be aware of the critical dates and ensure that the process adopted meets the party's obligations during that period.
4. During a long period for satisfaction of a condition the solicitor and client should maintain regular contact and ensure that steps taken to fulfil a condition are recorded. This will also allow review of the steps being taken. Justice Williams commented that the Flemings in the above case did not re-evaluate their situation and adopt a fresh strategy after the auction of

the neighbouring property was completed with only one bidder and no subsequent flow on of prospective purchasers to their property.

CONCLUSION

Buyers and sellers of residential properties (and parties to contracts generally) need to be aware that by entering into a conditional sale and purchase agreement they take on an obligation to do all things reasonably necessary to ensure that any condition is met. It is not possible for a party to use conditions to avoid the contract unless they can demonstrate they have taken reasonable steps to fulfil those conditions. To avoid the pitfalls illustrated by the Fleming case it is prudent to have any contract reviewed by your lawyer to ensure your intentions are properly reflected in the agreement.

© Harkness Henry & Co

email

shiree.blackwell@harkness.co.nz
Website www.harkness.co.nz