

TEN LEGAL TIPS ON THE PROCESS OF BUYING PROPERTY IN VICTORIA

1. 'CAVEAT EMPTOR' - LET THE BUYER BEWARE!

Looking for a property is an exciting and sometimes tense time, and the decision to buy is often one of the biggest financial commitments you will make in your life. So it is important to know where you stand legally.

Every seller is required by law to provide a Vendor's Statement to potential buyers, setting out details affecting the property's title, such as any mortgages, leases, easements, the zoning, rates and so forth.

If the seller is aware of anything from other parties that may impact on the value of the property, such as roadworks or acquisition for public housing, this must also be disclosed in the Vendor's Statement.

However, other than what appears in the Vendor's Statement for the property, a seller is not required to disclose matters such as structural soundness or whether the title measurements accord with the actual measurements on the ground.

The old legal principal of 'Let the buyer beware' takes over, and if there is a sagging roof, or stumping problem, the law says that any price you pay has this problem factored into it, and you cannot later obtain compensation.

So examine the property carefully yourself (including measuring the boundaries to ensure they match those of the copy of the title usually found in the Vendor's Statement), ask the seller or agent about anything you are unsure of, and get a builder or architect to do a proper check of the structure.

2. THE REAL ESTATE AGENT

Usually, the first contact you will have when searching for the property is the real estate agent.

The most important thing to remember in discussions with the agent is that he or she works for the seller, and rightly will act in that seller's best interests when showing you a property.

So to obtain the best possible price for his or her employer, an agent will naturally point out to you the positive aspects of any property, and at the same time will try and learn your and other buyer's requirements and limits.

It is up to you to try and learn about anything that may be a negative, and any information that may assist your side of the negotiations, while only disclosing to the agent information about yourself you are happy for the seller to know.

By law an agent is required not to mislead or misrepresent a situation, and the majority of agents are professionals who, while they may not volunteer information detrimental to the interests of the seller, will invariably answer any of your direct questions accurately.

So ask the agent everything you can think of about a property and the seller's situation, and remember that when asking that all important question of an agent's estimate of ultimate selling price, it is only an estimate!

3. THE AUCTION

This is one of the most common means of selling property in Metropolitan Victoria. Buyers rightly feel uncomfortable about them because auctions favour the seller.

It is usually a high pressure situation, with the auctioneer skilled in the art of generating emotional interest and competition, and the auctioneer can legally accept bids from people bidding on behalf of the seller to help increase the price.

Also, at auctions no conditions can be imposed by a buyer such as making a sale subject to finance approval or a satisfactory condition report from a builder.

During the auction you may offer smaller bids than those asked for by the auctioneer, which the auctioneer may or may not choose to accept.

You are legally allowed to have another person bid on your behalf. Just make sure when they sign the contract that they write next to their name, "and/or nominee", and that you have executed a proper written authority for them to so act, prior to the auction.

If you make the highest bid, the auctioneer can accept it, in which case you have bought the property, or the auctioneer need not accept your bid in which case the property is passed in.

If your bid is accepted, you will be asked to sign a legally binding contract of sale. If you change your mind between making the final bid and signing, or particularly after signing, you can be sued by the seller for compensation, or in rare circumstances forced to proceed with the purchase.

The fact that you do not have your cheque book for the deposit will not matter. Most agents carry blank form cheques in such instances.

If it is passed in, often negotiations will be sought by the agent with you privately.

So make sure you have visited the property at least twice before the auction, have the property checked out structurally, make sure you have finance approved up to the level you plan to bid, and try and stay within your limit in the heat of the bidding!

4. PRIVATE SALE

This method of sale is preferred by many buyers instead of an auction, as it allows time to consider carefully all aspects of a property and you know its starting price, from which you can attempt to negotiate down.

There is also time to consult others who may be involved in making the decision, such as parents who are assisting with finance or children who have a vested interest.

Note that if a property is attempted to be sold by auction but passed in, it may revert to being offered for private sale. This is often a beneficial situation for a buyer, as the seller may have had to lower his expectations significantly, and has incurred the cost of the auction with no result.

Unlike an auction, one can negotiate with an agent as to when the final amount is to be paid and the property is to change hands (known as settlement), what items might go with the property such as barbecues or furniture and so forth.

Of particular importance in this situation is the ability for you to negotiate the incorporation of conditions in any contract you sign, such as the contract being conditional on obtaining finance, or a satisfactory builder's report.

If these conditions are included and you are either unable to get approval to a loan from

your bank, or a builder declares a structure unsound, you can get out of the contract and obtain a refund of your deposit.

Just remember that once an offer is accepted by a seller in writing, you are legally bound, unless one of your conditions is not satisfied.

5. THE VENDOR'S STATEMENT

Every seller of property must provide a signed Vendor's Statement to a buyer, setting out details of the title of the property, rates, zoning and anything else which a buyer would reasonably want to know before committing to a purchase.

This is a very important document. If the seller has not disclosed something of significance (whether deliberately or by mistake) such as the fact that the zoning is commercial and one cannot use the property as a home, then you are entitled to get out of any Contract you sign at a later date, and obtain a refund of all monies paid.

For more minor errors such as an incorrect amount of rates payable, you would not normally be entitled to get out of the Contract, but would instead be entitled to compensation from the seller to the extent the error caused you loss.

So read a Vendor's Statement carefully, and if possible ask the agent to fax a copy to your solicitor or conveyancing agent for his or her perusal. In this way, you will have a clearer picture of what you are buying, and will know later if a seller has misrepresented some aspect, which if important enough may allow you to undo the Contract if you so wish.

6. THE DEPOSIT

Upon buying a property at either an auction or after negotiations with an agent or seller in a private sale, you will normally be asked to pay a deposit of ten per cent (10%) of the purchase price, either by cash or cheque.

If this money is paid to a real estate agent, the agent is required to keep that money in his or her trust account, and not release it to the seller until certain checks have occurred to be satisfied the title of the property is as described in the seller's Vendor's Statement.

The agent is under strict regulation to maintain those monies intact, and you should feel comfortable with entrusting the deposit to him or her.

Thus, once you have purchased a property and paid your deposit to the agent, you or your

solicitor should undertake a title search. You are also legally allowed to ask the seller questions (known as requisitions) about the title of the property within a certain time after signing the Contract. The seller must by law respond accurately to these questions.

If the title proves to be substantially different from what the seller has indicated, you can declare the Contract over and get your deposit back from the agent's trust account.

On the other hand, if there is no problem with the title, but you change your mind and do not wish to proceed with a purchase, you can be sued by the seller for breach of contract and must pay compensation. This usually involves the loss of your deposit, as the seller can have it released from the agent's trust account to pay for any losses incurred.

7. TWO POPULAR CONTRACT CONDITIONS FOR BUYERS

'Subject to Finance' and 'Subject to Builder's Inspection'

These two conditions are the most commonly sought by buyers in a private sale situation.

Subject to Finance

If the condition is included that the contract is subject to you getting approval for finance, it is usually worded so that a particular bank or finance provider is named and the loan amount you intend applying for. You then have a set amount of time, often around seven days, to obtain approval from that bank or finance provider, for the amount nominated.

Be aware you are required to notify the seller or agent in writing within the set time if you are unable to obtain approval from that bank/finance provider, for that amount. If you do not do so, the contract becomes 'unconditional', and you must proceed or pay compensation (like losing your deposit) even if you haven't been able to obtain finance.

If you need more time to find out the bank's decision, you should ask for it in writing from the agent, and obtain the agent's written consent on behalf of the seller.

If you are unable to obtain approval and properly notify the seller or agent in writing within the required time, usually with evidence such as a letter from the bank, you can get out of the contract and obtain a refund of your deposit.

Subject to Builder's Inspection

As for the finance condition above, you can insert another condition allowing you to have a

builder or architect, paid for by you, inspect the property within an agreed amount of time.

As for the finance condition, if the builder or architect declares a structure unsound, and you properly notify the seller or agent in writing within the required time, you can get out of the contract and obtain a refund of your deposit.

8. THE MORTGAGE

Unless you are one of the lucky few who can buy a property without financial assistance, you will need to enter into a mortgage with a bank or other lender.

You should commence this process as soon as possible after purchase of your property, if not before, to ensure the mortgage is signed and funds are ready for settlement.

The mortgage is quite simply a document that allows your lender the right to sell your property to recover the amount of money it lends you, if you don't pay an agreed amount at agreed times.

Upon settlement of your property, while you may get the keys, your lender gets the actual copy of the title to that property, and also has its name registered on the copy of the title held at the Titles Office. This ensures that you are unable to sell the property until your lender is satisfied that it has been paid out in full.

If you miss an interest payment, technically the lender can 'foreclose' the mortgage, which means your lender can legally walk in the next day, put up a "For Sale" sign and try and sell the property out from underneath you. It is commonly known as a "Mortgagee Sale" or "Mortgagee's Auction". Any monies they get from such sale go towards paying off your mortgage, and if there is a shortfall you will still be required by the lender to make up the difference. If there is a surplus after the lender is paid out in full including all interest to that date, that surplus is yours.

Practically, lenders dislike foreclosing due to costs and inconvenience. You should contact your lender if you foresee a problem. They will then normally discuss alternatives with you, such as increasing the term of the loan with reduced payments and so forth.

Prior to buying a property, if you need additional funds make sure your chosen lender has approved in principle the amount you wish to borrow, and it is advisable to again contact your lender as soon as you have bought a property, so that they may put in process the preparation of a letter of offer to you, which if you accept will result in the preparation of a mortgage for signing well before settlement.

HOUSING GUARANTEE FUND

By law, any renovations to existing property, or new structures including garages but excluding flats built after 1984, have the benefit of a guarantee with the Housing Guarantee Fund against defective workmanship by your builder.

This is provided the builder is properly registered as a member of the Fund. Most recognised builders are members, and should display evidence of their membership on their stationery.

This guarantee lasts for seven years from the date of the work, and can be passed on to future owners of the property.

The Fund is contributed to by builders who are members of the Fund, to ensure it is sufficiently financial to cover any claim you or a successor in title may have.

It is simply a matter of applying to the Fund, and an inspector will be sent out to examine your claim. If it is found to be valid, the builder is requested to repair or replace the problem, failing which you will be compensated and at liberty to employ another builder of your choice to resolve the defective workmanship.

9. BUYING 'OFF THE PLAN'

It has been common over the last few years to buy property "off the plan" and before it is constructed, particularly apartments.

Provided you do not need the property for several months, this way of buying property has its attractions, including a substantially decreased stamp duty, an ability to choose fixtures and fittings and colour codes to a certain degree and of course you know the place is brand new.

One thing to be careful about such purchases is when the developer/seller expects it to be finished.

It is often the case that properties sold before they are built are often one of many properties on of a Plan of Subdivision. Plans of Subdivision must be agreed to by the local Council, and registered in the Titles Office, and to save time a developer/seller will often have you sign the Contract prior to these events taking place.

The Contract will then be worded so that settlement, when you pay the money and get the key, will occur on a certain date, or within 14 days of the Plan of Subdivision being formally registered in the Titles Office, or within 14 days of a Certificate of Occupancy being issued, whichever is the later.

So while a date may be given to you, everyone must wait until the Plan is registered, which can take up to six weeks from being lodged, or until the local Council inspects the property and issues a Certificate of Occupancy indicating work on the property is for all intents and purposes finished.

As a rule, give yourself a buffer of a few extra weeks from the date you anticipate moving in, so you don't end up in the local motel with all of your possessions while a party outside your control decides when you will move in!

AN EXTRA TIP

FINAL INSPECTION

You have a right to request the agent to allow you to inspect the property a final time, within 7 days prior to settlement.

Should anything about the property not be the same as that at time of signing the Contract for its purchase, even in relation to the state of cleanliness or the garden, you should contact your solicitor to see if that can be attended to prior to settlement, or in the alternative compensation deducted from the balance of the purchase price.

DISCLAIMER: This information is provided as a broad overview and should not be relied upon as a substitute for legal advice. If you require further advice in relation to the above or Property, Franchising, Leasing, Trademarks, Commercial and Corporate Law, Trusts, Wills and Probate, please contact Mike Poynter or Shane Frost @ MCP Commercial Lawyers on (03) 9620 2001