

## POYNTERS' TEN LEGAL TIPS ON THE PROCESS OF SELLING PROPERTY IN VICTORIA

### 1. USE AN AGENT OR DO IT YOURSELF?

When you first decide to sell, it must also be decided whether you will employ an agent to advise and handle the task for you, or whether you will sell the property yourself.

While it is most common to employ a real estate agent, there is no legal impediment preventing you from selling your property through private sale, or indeed conducting your own auction.

If the real estate agent option is chosen, you are able to appoint one or more to act on your behalf. Normally a single agent is used, who will want you to sign an agreement appointing him/her the exclusive agent for sale of the property.

Many such agreements state that even if the agent does not find a buyer, and you personally sell the property within a certain time from when the agent is appointed, the agent will nonetheless be entitled to his/her commission.

Please note that commissions and advertising costs can now be negotiated and agreed with the agent prior to commencement of the relationship, and should be done in writing so there is no confusion.

The disadvantage of using an agent are the cost of the agent's commission, while the advantages of using an agent are that you are paying for expertise in that field, and can receive advice on the best time to sell, the best way to present your property, an independent party to hold all discussions and to show people through for inspections and thus leaving your time free, and someone who can indicate the price you should expect to obtain on sale.

If you are selling at auction, agents are skilled in extracting the maximum price the property can be sold for on the day.

The disadvantages of doing it yourself are a possible lack of knowledge as to exactly what needs to be done to obtain the best possible price and the imposition on your time, while the advantages are cost savings, interaction with

your prospective buyers and personal satisfaction.

### 2. YOUR AGENT

If you have chosen to appoint an agent or agents to sell the property for you, you should also remember that they are working for you.

Accordingly, you should feel comfortable asking your agent any questions you have about the most appropriate forms of advertising, when the property should be sold, when you should be open for inspection and the agent's view of the likely result.

In the same way that your prospective buyers are given an estimate by the agent of what he or she thinks your property is worth, any view offered to you by your agent as to the probably outcome is an estimate only, and is not a legally binding promise from your agent.

The most important thing to remember when using an agent is that under the laws of agency, anything your agent says or does on your behalf in relation to the sale of your property binds you personally. For example, if an agent indicates to a buyer that the property can be purchased at a particular price, and the buyer makes an offer at that price which is accepted by your agent, you are bound to honour that agreement.

Similarly, if your agent misleads or misrepresents a buyer about an aspect of your property, you may be sued by the buyer if he or she suffers loss as a result.

If the agent has acted in a manner not in accordance with your instructions, you may then have legal rights against the agent for any loss you suffer due to the agent's actions, omissions of statements.

To avoid unnecessary misunderstanding, clearly indicate to your agent what you want him or her to do, and if possible put it in writing!

### 3. THE SELLER AT AUCTION

While a seller may benefit from the fact that an auction is a culminating point for sale, and brings all potential buyers together at the one time avoiding drawn out negotiations and

creating pressure on the day to lift the price, there is pressure on a seller to sell.

Normally there is a long lead up time to an auction, with much work done to present the property in its best light, many inspections and pre-auction discussions.

Then picture yourself on the day, with a lengthy auction underway, and your agent informing you that the highest bid is still under your reserve price and he or she wants a quick decision of what to do. You have people standing outside your property waiting for your decision, with the costs and disappointment of a failed auction in the back of your mind.

At this point, you should remember that while you may have financial or other reasons for selling, you are not legally required to sell the property, at the highest bid or at any price.

All bids made by potential buyers, particularly the highest bid, are offers, and may be accepted or rejected by you.

You may choose to place a revised reserve price on the property at which you will sell, you may choose to end the auction without a result, or you may even call aside the highest bidder at that point and negotiate with them personally!

Whatever your decision, instruct your agent accordingly, and he or she must act on your instructions to inform potential buyers.

#### **4. PREPARING THE VENDOR'S STATEMENT**

Whether you are selling your property yourself or through an agent, any seller of a property in Victoria 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.

It is also commonly referred to as a Section 32 Statement.

This is a very important document. If you do not disclose everything 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 may allow a buyer to get out of any Contract signed at a later date, and that buyer could be entitled to obtain a refund of all monies paid.

It is therefore critical that you provide all information about the property of which you are aware that may affect a buyer's decision, to your agent and solicitor.

Examples of matters which should be disclosed to a potential buyer in the Vendor's Statement include any notice from your local Council advising of changes to your property or its immediate area including construction authorised under the Local Government Act, details of any Building Permits for improvements to the property, any notices of planned compulsory acquisition of your property by the Director of Housing, planned works by Vicroads which may impact on the nature strip or indeed the property itself, including plans for nearby major roads and freeways.

Everything you can think of should be included. Your agent and solicitor can then decide what may be excluded.

Remember, any contract to sell property without a signed Vendor's Statement is unenforceable and a buyer can walk away, obtaining a refund of any monies paid.

Similarly, a Vendor's Statement that leaves out a matter that you would reasonable expect to influence a buyer's decision, and which was known to you as seller or ought reasonably to have been known by you, may leave a way out for your buyer.

#### **5. RELEASE OF THE DEPOSIT**

Upon sale of the property at either an auction or after negotiations with an agent or seller in a private sale, normally up to ten per cent (10%) of the purchase price will be deposited with your agent (or in some cases your solicitor), either by cash or cheque.

This money is required to be kept in the agent's or solicitor's trust account to be held upon trust until, at the latest, settlement.

It can be released earlier to the seller upon:-

- (a) A Section 27 Statement being served upon the purchaser containing details of any mortgages or caveats affecting the property;
- (b) Certain checks having occurred by the purchaser to be satisfied the title of the property is as described in your Vendor's Statement; and
- (c) Either the Section 27 Statement is signed by the purchaser allowing release of the deposit, or the expiration of 28 days from service of that Statement.

It is normal practice for your agent to deduct his or her commission and associated costs

such as advertising, from deposits released from trust, prior to forwarding you the balance.

## **6. DISCHARGE OF MORTGAGES AND CAVEATS**

If you have a mortgage over the property, this must be discharged at settlement, as you must give the purchaser clear Title to the property.

Accordingly, you should contact your Bank or have your solicitor do so as soon as possible after sale, to ensure your Bank is ready to discharge the mortgage.

The Bank will advise your solicitor of the discharge amount required to pay out the mortgage at settlement.

The same process should be undertaken in relation to any Caveats on the property.

Settlement normally takes place at your Bank's offices in the City of the State in which you live.

## **7. ANSWERS TO REQUISITIONS**

The purchaser has the right to serve upon you a list of questions known as requisitions, about the property.

These requisitions involve everything from where the Title to the property is held, details of any leases or tenancy agreements, body corporate issues for flats where relevant, down to who owns the back shed and the fences.

If the purchaser serves these requisitions on you within 21 days of the date the Contract was signed, you are obliged to answer them to the best of your knowledge.

If an answer to a requisition is later found to be incorrect and ought to have been reasonably known by you, in some cases a purchaser will be entitled to get out of the Contract, and in others may be entitled at the least to compensation.

## **8. PAYMENT OF OUTSTANDING RATES**

All rates affecting the property, including Council, Water and Body Corporate (if any) are adjusted by the parties' respective solicitors to the day of settlement.

If rates have been paid in advance, a proportionate allowance is made in your favour. If any rates are outstanding, these are paid out at settlement from funds you would otherwise receive.

Prior to settlement, you should pay all rates when due to avoid any penalties or fines.

However, if you plan to make a payment within a week of settlement, you should advise your solicitor of that so any delay in receipt and processing with the authority in question, does not cause an adjustment without your payment being taken into account.

## **9. SETTLEMENT**

Within 7 days prior to settlement the purchaser has the right to finally inspect the property. The property is legally required to be in much the same state at time of settlement, as it was at the time the Contract was signed.

Accordingly, it is in your interests to ensure the property is in that same state, to avoid any last minute requirements by the Vendor to clean the property, attend to any garden untidyness and so forth, or in the worst case a delay in settlement or payment of compensation.

On the day of settlement, you should hand all final keys to the agent, and wait for the call from your solicitor that settlement has occurred.

## **10. DEFAULT BY THE PURCHASER**

If a purchaser is unable to settle on the due date, you are entitled to charge penalty interest, at the rate set out in your Contract (and if no rate is set out there at the rate of 2% above the rate provided for in the Penalty Interest Rates Act from time to time), upon the outstanding monies, until such time settlement occurs.

In addition to penalty interest, you are entitled to place a Rescission Notice upon the purchaser the day after settlement, which normally requires the purchaser to settle within 14 days of service of the Rescission Notice, failing which you have the right to retain the deposit paid by way of compensation and resell the property to a third party.

There may be other remedies you have, and you should consult your solicitor about same.

**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