

IN BRIEF  
**RAINEY COLLINS**  
LAWYERS  
AGENT CARE

Summer 2008

**WELCOME** to the Agent Care edition of Rainey Collins' newsletter.

## Mortgagee Sales – Reminder Tips for Agents

**Mortgagee sales can be a danger zone and as a selling agent it is important to be aware of the potential pitfalls, minimising potential risks for the buyers and for yourself...**

### Tip 1 - Legal Advice

The term 'buyer beware' applies more than ever in the context of a mortgagee sale, but making the risks absolutely clear to prospective purchasers is the best way to avoid having to explain to upset or angry buyers why they ended up on the losing end of a deal.

Because it is unlikely that a standard agreement will be used, legal advice is even more desirable than with an ordinary purchase. Encouraging prospective purchasers to take legal advice can minimise the risks to them and will also ease the burden on your shoulders.

### Tip 2 - Information

A purchaser at a mortgagee sale needs as much information as possible, as soon as possible, so that they can do their homework on the property. It is a good idea to have ready for anyone showing real interest:

- A copy of the proposed Agreement for Sale and Purchase
- A copy of the Title to the property
- A copy of the LIM report (if any)
- Any other information you might have about the property (for example rates, body corporate levies, any restrictions on the Title).

It is also a good idea to ensure that they know:

- That the Agreement being used is not standard (if it is not the standard form agreement or contains deletions of vendor warranties), and may lack many of the usual protections;
- That the property may be withdrawn from the market at any time before sale if the defaulting mortgagor makes an

arrangement with the bank to repay the mortgage. In some cases, even if the purchaser has entered into a conditional agreement to buy the property, the mortgagee could still potentially cancel it before it goes unconditional;

- That purchasers may not be able to gain access to see the property until settlement; and
- The mortgagee will usually not guarantee that the purchaser will get vacant possession on settlement.

Sometimes prospective purchasers may not even know that the sale is by the mortgagee – this is one thing that they can't afford to be unaware of. We know of one situation where the bankrupt homeowner whose house was sold by the bank cut up all the walls and stuffed them with dead fish, as well as cutting all of the wiring, ready for the oblivious purchasers to move into the next day! Purchasers at a mortgagee sale should always be prepared for the unexpected, and you are likely to be the easiest person for them to blame if they do get a nasty surprise.

### Tip 3 - Key Potential Issues

Because most vendor warranties will almost certainly have been deleted from the Agreement a buyer will usually have to do their own research on the property. Agents can suggest that prospective purchasers check out:

- **Rates:** are there any rates owing on the property?
- **Chattels:** what chattels are deleted from the chattels list? If chattels are deleted from the Agreement, which is usual, there is a risk that they will be stripped from the house before settlement. Where they have not been deleted, it may be possible to withhold funds in some cases if chattels have been damaged or removed. In a recent example, the bankrupt mortgagor stripped the house of everything down to the carpet, then held the purchaser to ransom for an extra \$10,000.00 to be paid to her personally for their return!

*Continued over page*



SARAH EDWARDS

## Our Guarantee

When acting for people buying or selling residential property we provide a risk free guarantee. We guarantee that our clients will be absolutely delighted with our service. If our service lets them down in any way we will fix the problem promptly at our cost.



JAMES JOHNSTON

## NEED HELP?

We are happy to field calls of a general nature to answer those little queries that come up from time to time, or to accept ideas for an issue you would like covered in our next edition. We value your feedback and invite you to call us on 0800 RC AGENT (0800 722 4368) and ask for Fintan Devine, or email Sarah Edwards on [sedwards@raineycollins.co.nz](mailto:sedwards@raineycollins.co.nz) with any questions or ideas you may have.



FINTAN DEVINE

## Mortgagee Sales – Reminder Tips for Agents *continued...*

- **Insurance/risk:** when does the Agreement provide that risk passes to the buyer? Defaulting owners have been known to trash the house the day before settlement and if the risk passes at the fall of the auctioneer's hammer then the purchaser will be stuck with the bill for the damage.
- **Restrictions on the property/rights granted to others:** the purchaser should check with the Council whether there are any restrictions on what they can do with the house or land, or whether any rights to the land (for example a right of way) have been granted to others.

In some cases defaulting owners may be willing to provide further information on the property or even allow access for open homes – it never hurts to ask! You should always be careful about any information you relate to the purchasers and never make any representations yourself as to the accuracy of this information.

### Tip 4 – Know Your Client

Is your client the mortgagee? If so, it is crucial that you remember that the mortgagee is your client – not the owner of the house. You may end up dealing more with the house owner than with your client and it can be easy to forget whose instructions you are obligated to follow.

Is your client the house owner? Assuming the mortgagee has started the mortgagee sale process, then your client can only sell with mortgagee consent. If you find a buyer you will have to liaise with the mortgagee's agent before the deal is sealed, or your client could enter into an unconditional Agreement which they are not able to honour.

### Tip 5 – Mortgagee's Duties

To reduce the chance of challenge by the defaulting owner, or anyone else with an interest in the property, you should bear in mind the duties of the mortgagee regarding the sale.

The mortgagee has a duty to try to get the best price reasonably possible for the property and this duty extends to their Agent. Both you and the mortgagee should be able to show that you made all efforts (within reason) to get the best price possible for the property in the circumstances.

The mortgagee also needs to understand that it is the mortgagee's responsibility to ensure that all legal requirements for the sale to proceed have been met; for example, the serving of appropriate notices on the defaulting mortgagor and others.

### Bottom Line

By following the above tips you will minimise the risks not only for vendors and purchasers but also for yourself as a property professional. A disgruntled purchaser trapped in a bad deal will usually have no rights against the mortgagee as vendor and may turn their attention to you as the Agent. If you have provided them with helpful and relevant information, advised them about the risks, are careful not to make representations about the property, and encouraged them to obtain legal advice, such action by a disgruntled purchaser is unlikely to be commenced, let alone succeed.

## DID YOU KNOW...

The new Property Law Act 2007 came into effect on 1 January 2008. One significant change is that, in certain circumstances, a Court can now order a Vendor to refund a deposit to a Purchaser even where the Purchaser is not entitled to cancel the contract.

For any questions you have in relation to the new Property Law Act, please don't hesitate to contact the Commercial Team at Rainey Collins.



CLAIRE COE

## RAINEY COLLINS LAWYERS

Tel (04) 473 6850 | Level 23 Vodafone on the Quay  
Fax (04) 473 9304 | 157 Lambton Quay  
DX SP20010 | PO Box 689  
[www.raineycollins.co.nz](http://www.raineycollins.co.nz) | Wellington 6140

### Receive future editions of In Brief

If you are not on our mailing list and would like to receive future editions of In Brief, phone Maureen on 04 473 6850 or email [mharris@raineycollins.co.nz](mailto:mharris@raineycollins.co.nz)

You can unsubscribe in the same way if you do not want to receive future copies.

