

In brief from
RAINEY COLLINS
LAWYERS

Summer 2011

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WELCOME

... to the Summer 2011 edition of Rainey Collins In Brief newsletter.

In this edition we discuss tips on how to avoid being caught out from those house purchasing nightmares, mortgagee sales, an important notice for shareholders, what potential migrants need to know and issues arising when an employee was found to have been unjustifiably dismissed.

I trust you find the information of interest and value.



JAMES JOHNSTON

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The house purchase nightmare - Tips to avoid being caught out...

Sally and Jim were excited about purchasing their first apartment. They had seen it as an open home and were delighted to have not only found a home that they loved but one which was in their price range.

They had been looking for just the right place and as this was "the one" they decided to go with their heart and put in an unconditional offer, with settlement two weeks from the date of signing the agreement.

Unfortunately their delight soon turned into a nightmare when they realised that the person they had in mind to take over the fixed term tenancy of their current rented house had a change in circumstances and could no longer take over the tenancy. As they were tied into the tenancy for another six months the only way out of the tenancy was to find replacement tenants.

If they were not able to arrange new tenants by settlement date they would need to continue to pay rent on the property until they could find someone suitable as well as make mortgage payments.

Things got worse when they went to their bank and found that the bank was unable to lend them all the funds they required for settlement as it was the bank's policy to only loan up to 80% on apartments. They had been relying on being able to borrow 90%.

On top of this, when they saw their lawyer, they were given a copy of the Body Corporate rules for the apartment building. Unfortunately there was a requirement not to have any animal that created a nuisance. They had an adorable, but particularly vocal, dog that they could not handle the thought of being without.

This was the last straw for Sally and Jim and they asked their lawyer if they could pull out of the contract. They were devastated to hear that they couldn't.

If Sally and Jim had taken appropriate precautions, and advice about what was required when purchasing an apartment, they may have been able to avoid this situation. The addition of appropriate conditions in their Agreement for Sale and Purchase and making their offer conditional on finance and approval of Body Corporate rules and documents, would have helped.

They would have had the option to cancel the agreement when they were unable to obtain the finance they required, or if they were not happy with the Body Corporate rules.

Rather than facing losing their deposit and the possibility of legal action, Sally and Jim had little option other than to borrow money from Sally's parents and continue to pay rent for their old house until they found a new tenant. They also had to leave their much-loved dog with Sally's parents. Instead of being the most exciting time in their lives, they spent the first six months in their new apartment living with no money while they paid back Sally's parents, paid rent

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and also had to meet their mortgage commitments with the bank.

To avoid this situation Sally and Jim could have taken some simple precautions before completing the purchase. The following are 5 key tips that you can take to help ensure that the purchase of your dream home doesn't turn into a nightmare!

1. Include appropriate conditions in your Agreement

Common conditions to consider include approval of title, confirmation of finance to purchase the property, builders report, Land Information Memorandum (LIM) report and approval of the Body Corporate documents.

2. Think carefully about your settlement date to make sure it gives you enough time to organise your finance to purchase the property, and consider obtaining prior finance approval from your bank.

You need to give your bank enough time to prepare your mortgage documents, as well as making sure you

have access to funds you need for the deposit and your contribution.

3. Consider your existing tenancy, if any, and the time period for giving notice or finding replacement tenants.

You can then work your settlement date around that.

4. If you are buying at auction or unconditionally, do your homework first!

At auction you are bound as soon as the hammer goes down, so you need to have done your homework well before that happens.

5. Get legal advice! Don't sign anything you are not happy with or don't fully understand, until you have spoken to your lawyer.

FREE FIRST HOME BUYERS SEMINAR
Check our website for details



OLIVIA PORTER

Giving notice to tenants when selling a property – Don't get caught out!

Kyle owned an apartment which he rented out on a monthly basis to a young couple. When he sold the property, he gave them 3 weeks notice to move out of the property, which he thought was the correct notice period. Unfortunately for Kyle, the minimum notice a landlord can give a tenant when a property is sold is 42 days and he was stuck when the tenants insisted on 42 days notice. Fortunately he was able to come to an agreement with the purchasers to move the settlement

date, otherwise he would have had to pay compensation to his purchasers for not being able to move in!

For both tenants and landlords, it is important to be aware of the notice period required if a property is being sold. If tenants are on a fixed term tenancy, then unless the tenants agree otherwise, their tenancy cannot be terminated (even by sale of the property) until the term of the lease has expired. If the tenants are on a periodic tenancy, as in Kyle's case, the notice period is 42 days from the day after the notice is given. If you are unsure, you should seek legal advice so you don't get caught out.

SARAH BLANEY



Helping family out with buying property – It's not as simple as it might seem...

Ian and Nola's daughter Nikki was looking at buying her first home with her partner, Tom. Given that Nikki and Tom had very little equity to contribute to the purchase, Nikki's bank requested that Ian and Nola provide a guarantee over Nikki and Tom's borrowings of \$400,000 with the bank and put a mortgage over their own freehold property. Ian and Nola trusted Nikki to repay the mortgage so agreed to this arrangement.

When they went to see their lawyer to sign the guarantee and mortgage, it was pointed out to them that they could ultimately be forced to sell their own property if Nikki and Tom defaulted on mortgage payments if they did not have enough cash to repay the mortgage. Although Ian and Nola had about \$275,000 of hard earned retirement savings, they

did not have enough to repay the entire mortgage if required, so were very concerned that their family home could also be at risk.

There are other ways to help your family buy property without the need for guarantees and mortgages over your own property. For instance Ian & Nola could have set up a loan to Nikki and Tom (recorded in a loan agreement) that would have helped them get their loan from the bank without the need for Ian & Nola to enter into a separate guarantee and mortgage themselves, and so limiting their exposure. There are many options and you should talk to your lawyer about them before signing up to anything.



CLAIRE COE

Problems meeting your mortgage? Tips to help...

Sometimes this worrying situation arises from an innocent change of circumstances. For example you could have been made redundant, your relationship may have ended, or there could be other circumstances out of your control.

The first thing is realising that you can't afford to pay the mortgage, and that you need to do something about it. Second, you should talk to your Bank or lender about your situation. This can be a difficult step as often people are not willing to acknowledge that they are in financial difficulty. By making contact with your Bank or lender you will maintain some control of the situation and be able to explore options for repayment. This may avoid the Bank taking control and issuing a Property Law Act Notice/ Default Notice that could lead to a mortgagee sale of your home.

The options that the Bank or lender may consider include:

- Changing the time and frequency of payments e.g. from fortnightly to monthly;
- Extending the term of the mortgage so that you have smaller payments to make; and
- Changing the repayments to interest only, until your financial circumstances improve.

Of course there is no guarantee that your Bank or lender will offer any of the options outlined above, especially if they think that your inability to service the loan is likely to be long term.

Before any action can be taken, the lender (mortgagee) must serve on you a Default Notice under the Property Law Act 2007. This Notice is required to outline the defaults you have made under the mortgage and note exactly what the arrears are, including any penalties. The Notice will usually give you a period of not less than 20 working days to remedy the defaults after you receive it.

If you cannot remedy the defaults you should immediately discuss this with your Bank or lender. It may be sensible to instruct a lawyer to see if they can negotiate an arrangement on your behalf.

In the end if you cannot pay the mortgage there will come a time, sooner or later, when the Bank or lender will decide to sell your home. After all, the purpose of the mortgage is to give the Bank security over your home so that if you cannot pay the mortgage, the Bank or lender can sell it to recover their money.

If you are in this unfortunate position, you should try to be proactive and if possible keep control of the situation. Most Banks or lenders would prefer for the owner to organise the sale rather than have to force a mortgagee sale. However, the sale price must be fair, reasonable and in line with current market values. If the sale price is not enough to repay the mortgage then you may have difficulties persuading the Bank or lender to release its mortgage unless you can convince them that you are selling at market value. If the Bank has already entered into a contract to sell the home then obviously you have lost the opportunity to sell it personally, and will be bound by the Bank's contract and will have to give up possession to the new buyer.

It is important to remember that you can stop the sale of your home by paying all that you owe right up to the last minute before the sale and purchase of the house is completed.

The most important advice we can give you is...

1. Act fast! Receiving a Property Law Act Notice/Default Notice can be a very stressful time. The best thing to do is act quickly, speak to your Bank or lender and get some professional advice if required.
2. Don't ignore the Notice, it won't go away.



TRACY ROBINSON

\$50 survey vouchers & prize winner

Congratulations to those who have won \$50 legal services vouchers for being one of the first 50 people to respond to our survey for preference of receiving 'electronic' or 'hard copy' Rainey Collins General Issues newsletters. We really appreciate your feedback...thank you.

And we are pleased to announce that...

Jennifer George

is the winner of the bottle of champagne. Congratulations Jennifer!



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Follow us also on  @RaineyCollins

Are your overseas family members thinking of staying for longer than just a holiday? What potential migrants and their sponsors need to know...

The holiday season is a time when many families and friends reunite for the holidays to enjoy the New Zealand summer. For friends and family members travelling from overseas, it can also be a time to think about the possibility of joining loved ones in New Zealand or seeking employment in New Zealand.

Many people who are seeking to migrate to New Zealand need to be sponsored by a family member or friend, whether they are seeking a visa on the basis of their employment or on their relationship to a New Zealander. What you need to know is exactly what you or your sponsor could be signing up for.

Recent changes to immigration laws have strengthened sponsorship requirements, and sponsors will now be responsible for all aspects of maintenance, accommodation and deportation for the sponsored person. If a sponsor does not pay the sponsored person's costs, the sponsored

person is in breach of their visa and could be deported. If a third party or the Crown is required to pay for costs associated with a deportation, the third party or the Crown can recover the costs from the sponsor in court. As costs associated with court proceedings and deportation can be considerable, caution is required before signing up to such obligations.

So if you are seeking a sponsor for your immigration application or considering sponsoring a friend or Family member, we suggest you seek prior advice to ensure that there are no unpleasant surprises.

Is your company, charitable trust or society considering being a sponsor?

**Visit our website
www.raineycollins.co.nz
to find out what you need to know.**



JO-ELLA SARICH

Year's salary plus \$13,000, and reinstatement, for unjustified dismissal...

The Employment Relations Authority has ordered an employer to pay a year's salary plus \$13,000.00 for damage to an employee's reputation and hurt and humiliation. In addition reinstatement was ordered after a year out of the business.

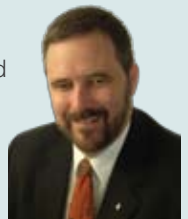
Once again an employer failed to follow the correct process for raising disciplinary matters with an employee. They failed to put accusations to the employee, failed to give an opportunity to respond, and acted on unfounded accusations of dishonesty.

The employee was dismissed on the spot without ever being told what the accusations were, and was not even asked for an explanation.

One alleged failing was of not following procedures, which turned out to relate to a period when the employee was away on sick leave so they could not have been involved.

Another was that they suspected money was going to be stolen when the employee contacted the bank for information at the suggestion of the auditor. She was fired as soon as the employer found out she had talked to the bank without asking why she was contacting the bank, which was related to her tasks.

For our free guide on how to carry out a disciplinary investigation see the download section on our **website at www.raineycollins.co.nz or call me on 0800 733 424.**



ALAN KNOWSLEY

RAINEY COLLINS LAWYERS

Tel (04) 473 6850 | **Level 16**
Fax (04) 473 9304 | **163-171** Featherston Street
DX SP20010 | **PO** Box 689
www.raineycollins.co.nz | **Wellington** 6140

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