

YOU AND YOUR PROPERTY

BY RESIDENTIAL PROPERTY LAWYER
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The term "fine print" is synonymous with lawyers. Lawyers are notorious for their ability to interpret and manipulate words to have meanings a lay person would not necessarily agree with. It has been said a good lawyer can change black into white if it was to their client's advantage.

Lawyers are expected to be interpreters of parties' intentions and then to translate those intentions into contractual documents. This process usually works well where the intentions are well communicated. Problems arise when the instructions are too loose or the parties sign agreements without taking legal advice.

I have recently had cause to advise clients in respect of the sale of their home and purchase of a subsequent property. The clients first approached me after they had signed an agreement to purchase a property. Before approaching me, they contacted their Bank and made arrangements for finance. Their Bank had agreed to provide finance. On the basis of the Bank's offer of finance, my clients understood it was not necessary to include a finance condition and entered into the Agreement on that basis. The Agreement was only conditional upon the sale of their house.

Prior to the sale of my clients' property, their Bank made some further investigations in respect of the property being purchased. They requested my clients obtain a building report and a valuation report. My clients obtained both reports and provided them to the Bank. Both reports appeared on their face to be satisfactory. The valuation report was fine, but the building report noted a small percentage of the building was clad in a material which had a propensity to fail and cause leaks. Less than 48 hours prior to tenders closing for our clients' sale, the Bank notified our clients they were withdrawing the offer of finance. Our clients were then placed in the invidious position of not knowing whether or not to accept offers for the sale of their property (thereby allowing them to cancel their purchase contract) or if they should accept offers on their property and attempt to find another lender.

Our clients' mortgage broker attempted to find another lender, without success. This

gave rise to a number of contractual issues, including:

1. what obligation did our clients have to accept reasonable offers from buyers for their property?
2. what obligation did our clients have to sell their property and confirm the purchase agreement, even though they would be unable to complete the purchase because of the withdrawal of finance? and
3. the Bank's obligation to honour its offer of finance.

I was provided with a copy of the offer of finance from the Bank. Somewhat unusually it was not expressed to be conditional. The offer specifically mentioned the property our clients were purchasing and the proposed purchase price, together with the amount of lending required. I put the Bank on notice that they did not have a discretion to withdraw their offer of finance and to demand they reinstate

it within a matter of hours. I advised the Bank we would hold it responsible for any losses suffered by our clients. After a day of extensive negotiations, the Bank agreed to reinstate the offer of finance and our clients were able to accept tenders for the sale of their property, and confirm their purchase contract.

If the Bank's offer had been expressed to be conditional upon the Bank approving the property, our clients would have had no leverage with the Bank. What is worse, they had a duty of good faith to attempt to satisfy any conditions in their agreement to purchase. That agreement was only subject to the sale of their property. If reasonable offers had been presented (which did eventuate) they were obliged to accept one of those offers and thereby confirm their contract for the purchase of the new property. They would then have defaulted on the purchase, sold their property to a third party and had nowhere to live. By defaulting, the vendor could have then sued them for any losses suffered. Those losses would include any difference in price in any subsequent sale of the property. It is entirely possible those losses could run into the hundreds of thousands of dollars.

We were able to obtain a satisfactory outcome for our clients in this instance. However, the emotional stress our clients were placed under for a period of nearly 48 hours was truly awful for them. They were genuinely concerned that, through no fault of their own, they may potentially be at risk of losing hundreds of thousands of dollars.

As lawyers, it is our responsibility to ensure you are adequately advised through a process. It is always preferable to engage us early in the process so we can give you proactive advice to avoid issues such as these.

It is, in my view, a false economy to assume everything will be alright and to ask your lawyer to be involved once the agreement has been concluded, rather than asking them to advise you on the wording of any agreement. Obtaining quality advice early in the process will result in many pitfalls being avoided altogether.

"If you would like a copy of previous articles on property written by Michael email him on michael@homelegal.co.nz."

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