

YOU AND YOUR PROPERTY

BY RESIDENTIAL PROPERTY LAWYER
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The Kiwi 'Yeah... nah... she'll be right' attitude might endear New Zealanders to the world, but the recent High Court case of Kerr v Lee made it clear such an approach is not enough to satisfy conditions under an Agreement for Sale and Purchase. In this article I outline the impact of the decision on property owners and the importance of using your best endeavours to satisfy conditions. I also give advice on how purchasers can avoid breaching those obligations.

The case centred around an agreement for sale and purchase between the Kerrs and the Lees. The Lees owned a property in Takapuna and were interested in buying the Kerrs' Massey property. After discussion with a real estate agent (Mr Chang) as to what the Lees might get for their own property, the Lees signed an agreement to buy the Kerrs' property for \$1.8 million. The agreement was conditional on the Lees entering into an unconditional contract for the sale of their Takapuna property by July 7, 2007. One of the conditions of the contract recorded that the Lees required a sale price of \$950,000 for the Takapuna property. Not long before settlement the Lees' lawyer told the Kerrs' lawyer the prior sale condition

wasn't satisfied, and the agreement was cancelled. The Kerrs' lawyer contended the Lees were obliged to settle, as they hadn't listed their property and had taken no other steps to sell.

The Lees responded by saying it wasn't necessary to list their property for sale as they had obtained valuations and real estate agent appraisals which showed the value of the Takapuna property was substantially less than \$950,000. The property appraisals indicated a value of between \$700,000 and \$800,000. The valuer suggested that renovations were required to achieve a sum of \$950,000. This valuer's opinion was endorsed by Mr Chang. The Lees had even completed renovations (costing between \$25,000–\$35,000) to increase the value of the house.

Contemporaneously with the renovations, the Lees entered into a private agreement to sell the Takapuna property to a friend (Mr Jeong) for \$910,000. This agreement was conditional on a satisfactory valuation. Because they had a signed offer for the Takapuna property the Lees elected not to list the property with a real estate agent. Mr Jeong obtained a valuation of the Takapuna property for \$840,000. After a failed attempt to negotiate the price down, the agreement was cancelled by Mr Jeong.

The Lees then approached another agent (Mr Soek) with a view to listing the property. Mr Soek believed a sale of price of \$800,000 was realistic. The Lees asked Mr Soek to list the property for \$950,000. Mr Soek told the Lees it was not worth his while, given that

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it would be virtually impossible to sell the Takapuna property for \$950,000 within the short timeframe required.

It's not clear from the facts of the case why this matter ended up in court. There's no record of any negotiations between the parties in the intervening six years between the above events and the hearing in 2013. It appears likely the proceedings were issued in 2013 as the Limitation Act 1950 (which applies in respect of this case) prohibited claims being filed six years after a demand is made.

The court held that the Lees had breached their obligations under the agreement. Although they took some steps towards selling the property, the agreement required them to take **all** steps that were reasonably necessary. Listing the property was considered by the court to be one of those reasonably necessary steps. While other necessary things were done, these were insufficient on their own.

The court agreed it was not unreasonable for the Lees to defer listing and advertising while they undertook prompt renovations. However the Lees should have immediately put the property on the market once the renovations were complete. The decision is silent on the method of listing the property and it's not clear if listing the property on, say, Trade Me would have been sufficient.

The court wasn't satisfied the Lees' decision to wait and see what happened with Mr Jeong's Agreement for Sale and Purchase before listing the property was prudent. In the court's view listing the house with a real estate agent would attract more interest and

therefore more likelihood of a successful sale. After considering the parties' submissions the court ordered the Lees to pay the Kerrs \$100,000 (the deposit under the agreement) plus costs and interest.

This case followed another case, *Mana v Fleming* where the purchasers (the Flemings) were also found to have breached their obligations under a prior sale condition. The Flemings were worried about openly advertising their property because of the adverse effect it might have on their local lawn mowing business. They thought their business would lose its value if local customers knew they were leaving the area. Again, the court considered that 'covert' marketing and advertising was sufficient initially. Once the purchasers received no interest, however, the court said they should have begun to openly market the property.

In each of these two cases the courts noted the purchasers had not sought legal advice as to their obligations. These two cases reiterate the importance for buyers and sellers to get legal advice before committing to an Agreement for Sale and Purchase. While both cases related to prior sale conditions,

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the principles apply to any conditional agreement.

If an agreement is conditional on any conditions, reasonable steps need to be taken to satisfy those conditions. For example, if a contract is conditional on obtaining satisfactory finance then enquiries need to be made of lenders (or a broker) as to the availability of finance. If these steps aren't taken, the above two cases would suggest a buyer may be obliged to buy the property or pay damages to the seller. If finance isn't available it would be wise to have the lender or broker confirm this in writing so there's evidence if the cancellation of the agreement is challenged. Likewise, if a contract is conditional on an expert's report, those reports should be provided in writing.

Real estate agents are obliged to recommend that vendors and purchasers get legal advice before signing an agreement. There are very good reasons for this. Once an agreement is signed the parties are strictly bound by the provisions in the agreement. A cavalier attitude to contractual obligations can be a recipe for disaster. Legal advice should always be taken before signing an Agreement for Sale and Purchase, whether you are a vendor or a purchaser.

“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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