

# YOU AND YOUR PROPERTY

BY RESIDENTIAL PROPERTY LAWYER  
MICHAEL HOFMANN-BODY



*In my last article I discussed the merits of trying to save money when buying or selling a home. The economic climate we presently live in encourages us to be cautious with our money. When financial times are rosier we can be more reckless with our cash resources. However, the alternate side of this coin is the temptation to accept risk in an effort to save money. I have heard several stories in the past month of how attempts to save money have cost clients large sums of money. When you are spending hundreds of thousands of dollars on a new house it is always wise to invest some money into your due diligence before committing to the purchase.*

**I**n this article I focus on the role of the lawyer in a conveyancing transaction. In my opinion, a key part of a lawyer's role is to keep and enforce promises given by parties to the conveyancing transaction. These promises are known as undertakings. If a lawyer fails to honour their undertakings they can be forced to do so by the courts and will likely face censure from the New Zealand Law Society. Such censure can and does result in disbarment of solicitors.

Conveyancing involves a complex matrix of relationships. Obviously the seller and buyer have a contractual relationship governed by their agreement. What is less obvious is the role that seller and buyer's banks have to play. There are also insurers, Kiwisaver funds, agents, local authorities, Quotable Value, tenants, body corporates, neighbours and mortgage brokers who all have their separate responsibilities and requirements.

It is the lawyer's job to bring all of those relationships together and ensure each

parties' concerns are met (insofar as that is possible given the lawyer's responsibility to look after his or her client as a priority) before the transaction is completed. Much of this activity is invisible to the buyer and seller but it is critical to the transaction happening. Examples of those roles include:

- Banks will generally not lend money unless they are confident the person or persons borrowing the money has had the documents fully explained in accordance with the Credit Contract and

*Continued on page 10...*



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Consumers Finance Act 2003, that the property is insured and that a mortgage will be registered over the title to the property securing the bank's advance. Until all of these requirements are complied with, the bank will not allow money to be advanced to the person purchasing the property.

- In the case of a solicitor acting for a seller, the seller's lawyer makes promises to the buyer's lawyer that the property can and will be transferred to the buyer upon receipt of the purchase price. The seller's lawyer must also give promises to the buyer's lawyer that all mortgages and other charges will be repaid on the settlement date. Finally the seller's lawyer makes promises to the seller's bank that any loan secured over the property will be repaid from the sale proceeds.
- A buyer's lawyer promises that the purchase price has been deposited to the seller's lawyer's account and the funds transfer will not be dishonoured or reversed.

Historically this arrangement with lawyers being the givers and keepers of promises has worked well in the New Zealand context. In other jurisdictions, most notably the US, lawyers have not been trusted in the same way. While lawyers in the US are still engaged by the parties to complete the transfer formalities, the money and the documents are all provided to an escrow agent who holds both the documents and the money on behalf of the parties until both parties confirm the documentary requirements have been completed. Only at that time will the documents and money be released to the other party. Escrow agents charge significant fees for providing this service, sometimes as high as one per cent of the purchase price. Even with the Escrow agent involved parties still have to engage a lawyer. Thankfully, New Zealand has managed to avoid this additional level of bureaucracy and cost in conveyancing transactions. If we did not have such a robust system enforcing the promises of lawyers we would be compelled to follow the US route and the cost of buying and selling would be further increased.

*"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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*Examining the 'small print' of the latest edition (nin<sup>th</sup>) of the ADLS/REINZ Agreement covering the sale of real estate was discussed during a HomeLegal Forum for real estate agents at the Upper Hutt Cosmopolitan Club recently.*

*Pictured at the well-attended event, a first in Upper Hutt for the firm, were: ...*



Krissy Allen, Nina Guthrie and Mark Williams from Gillies and Mark The Professionals.



Home Legal's Jeremy Hucker with Mark Jones (Harcourts Upper Hutt).



John Boyle with George Pene of Gillies and Mark The Professionals.



Financial Advisor with Chris MacKay Financial Planning Ian Jordan with Steve Slicker of Tommy's.

Left to right: Jo Den Harder and Susan and John Spencer, all of Harcourts Upper Hutt.

Steve Mahoney of ReMax and Brendan Ojala of Velocity Finance.



Left to right: HomeLegal's Sam Walker, Michael Hofmann-Body and Jeremy Hucker.