Fineprint | ISSUE 85 Winter 2021

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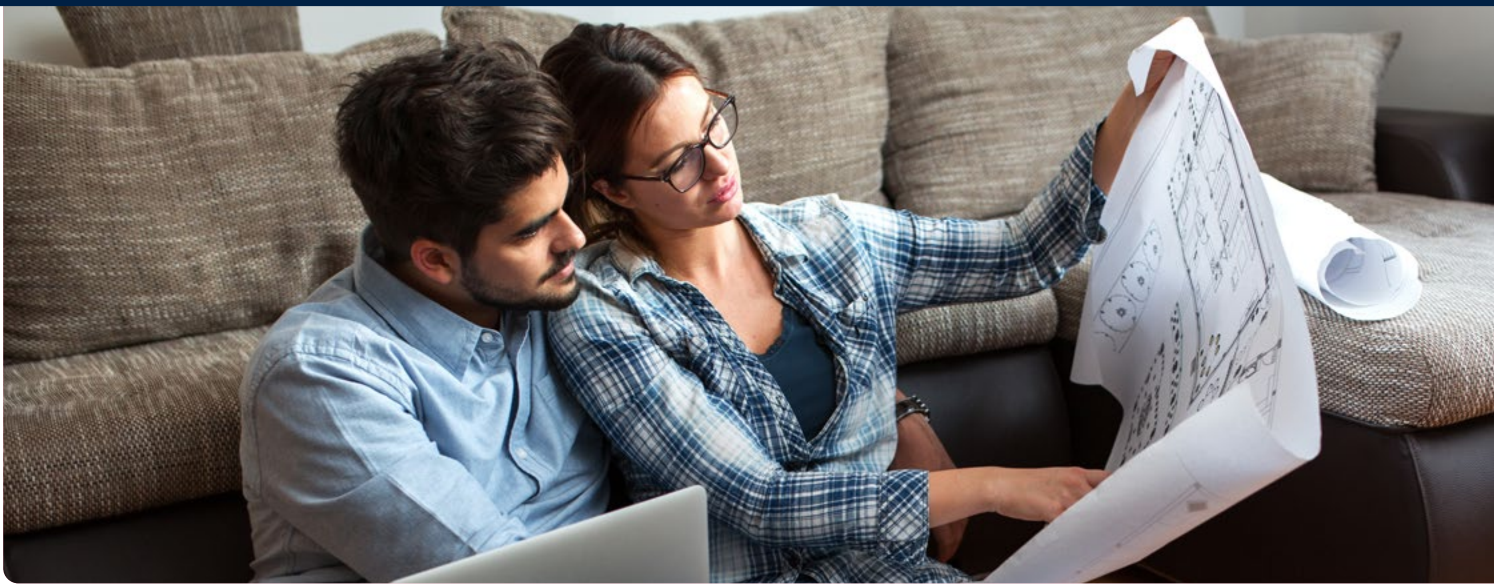

Buying off the plans

Becoming a more popular option in this tight housing market

It's no secret that the housing market in New Zealand is incredibly competitive at the moment. Already on a trajectory pre-Covid, demand has shot up since New Zealand came out of lockdown. Many people are choosing to 'nest' rather than spend on overseas holidays and thousands of expats are returning home earlier than planned.

Open homes often have queues out the door, many vendors choose to sell at auction where they can expect to make top-dollar and the supply of existing homes for sale is starting to run low.

As a result of this tight market, many people are deciding to buy off the plans. Buying off the plans has become popular with increasing numbers of land developments both in central cities and the suburbs. It has become increasingly popular in Christchurch, for example, where developers are playing a key role in regenerating the city post-earthquakes.

What is 'buying off the plans'?

Buying off the plans is when you sign an agreement to purchase a property sight unseen, typically from a developer, before construction has been completed or, in some cases, even before the build has begun.

If you get in early enough, you may be able to modify the design to suit your taste and style.

Instead of going to an open home and getting the feel for a place when you walk in the door, you are deciding to buy based on your review of the plans and specifications prepared by the developer. While this prospect may be daunting to some (especially the visual learners out there), the result is you will end up with a brand new home constructed in accordance with the latest building standards. If you get in early enough, you may be able to modify the design to suit your taste and style.

How does it work?

With no open homes, no auctions and sometimes no real estate agents, the process of buying off the plans is different to purchasing an existing home. You still sign an Agreement for Sale and Purchase. However, unlike getting a building report to ascertain the condition of the dwelling, you need to consider whether the property will meet your needs by looking very carefully at the plans and specifications as well as considering the property's location and outlook. The developer may have already completed other similar homes that you can view to get an idea of their style and workmanship.

In this issue +

When you decide to proceed with the purchase, you pay a deposit to the developer. This is usually 5% to 10% of the purchase price. You then may need to wait some time for construction to be completed and a code compliance certificate to be issued before you pay the balance of the purchase price to the developer and move in. This longer timeframe may be attractive to some buyers as the construction period allows more time to save.

Sometimes, the agreement may have a deadline date by which you can withdraw from the purchase and have your deposit refunded if construction has not been completed. This is known as a sunset date.

Why buy off the plans?

Unlike buying an empty section and building your own home where construction prices may increase over time, buying off the plans usually means the purchase price is locked in when you sign the agreement. The upside may be that, depending on the market, the property may have increased in value even before you move in.

You will also have the benefit of owning a brand new home constructed to the latest building standards. This means there should be little to no maintenance or repair work required by you, at least for the first few years. A brand new home will also typically be warmer and drier than an existing one.

Another advantage of buying off the plans is that by purchasing a new home you may be eligible to use the Kāinga Ora First Home Grant of up to $10,000 per person.

What to look out for

There are a few things to look out for when buying off the plans. If you need a roof over your head sooner rather than later, agreeing to buy a property off the plans could be problematic as the timeframes are usually quite long.

As there is no open home to 'try before you buy', you should get an understanding of the exact outlook and location of the dwelling – make sure there is sufficient sun, it won't be overshadowed by a large building next door and so on. You should also note the room dimensions and compare with your existing living or bedroom space to get a feel for how much room you will have once the walls are up.

There might not be flexibility in layout and design so do check that the design of the dwelling is actually what you want.

Seeking out other dwellings completed by the same developer could help you get an idea on the look and feel of your new home.

Getting more technical, it is very important to check the fine print in the agreement and seek legal advice (talk with us!) as to whether the purchase price can be increased by the developer, and what happens if construction takes longer than expected. In addition, we can advise as to whether a sunset date is in place for you to withdraw from the purchase if construction has not been completed by a certain date. It is also important that only you can withdraw from the purchase in these circumstances, not the developer.

You should also ask around about the reputation of the developer and whether they are known for the quality of their buildings, sticking to their proposed timeframes and so on.

Buying off the plans can be a great way for prospective buyers to get on the property ladder and to own a brand new, warm and dry home.

We strongly recommend that if you are considering this way of buying a property, you talk with us early on so we can guide you through the process. +

New edition of *To Trust or Not to Trust*

With the new Trusts Act 2019 that came into force on 30 January 2021, we now have a new edition (the 4th) of *To Trust or Not to Trust: a practical guide to family trusts*.

To Trust or Not to Trust has chapters on:

+ Establishing a family trust: is this for you?
+ Trusts Act 2019
+ Protection given by a family trust
+ Transferring assets
+ Decisions to be made
+ Completing your estate plan
+ Family trust administration
+ What will a family trust cost?

This new edition lists trustees' mandatory and default duties and obligations. It sets out the changes the Trusts Act brings to some provisions for beneficiaries, and explains that trustees who are no longer mentally competent can be more easily replaced.

If you are thinking of how you would like your assets protected, this guide is a very good starter for you to understand how a family trust works. For those of you who already have family trusts, this 4th edition provides an update on the changes the new legislation has brought.

If you would like to talk more about asset protection or your current family trust, please don't hesitate to contact us – our details are on the outside back cover. +

Climate Action Toolbox

We all need to do our bit to reduce carbon emissions and look after the planet better than we have previously.

In late March, the Climate Action Toolbox was launched in a major collaborative effort involving the Sustainable Business Network, a number of government agencies and some private sector businesses.

The Climate Change Commission had identified a need for tools to help smaller businesses take action on climate change. Its goal is to help businesses create a tailored step-by-step plan they can use to reduce emissions.

Many small to medium-sized businesses want to do their bit, but are unsure on how to start or what could make the most impact. The Climate Action Toolbox provides tailored advice and support around moving people, moving goods, office operations, site operations and equipment, and designing and making products.

Businesses can work through a self-assessment to identify which areas are relevant to them. Under each area you can choose from a range of specific actions to improve the climate impact of your business. Activities range from limiting non-essential travel, using heating and cooling options efficiently, buying sustainable products, recycling and reducing what goes to the tip, buying products produced locally, using equipment efficiently and upgrading to cleaner technology where possible.

To find out more about how your business can reduce its carbon footprint, go to **www.tools.business.govt.nz/climate/** +

Post-Covid working world

Keep employment agreements and policies up-to-date

Over the past 18 months, we have seen significant changes to employees' hours of work, rates of remuneration and the expansion of flexible working arrangements as businesses have adapted to the Covid economy.

With most sectors of our economy recovering, and and despite some occasional changes in alert levels, both employers and employees should ensure that any agreed post-Covid terms of employment or changes to the workplace are accurately recorded in their employment documentation.

Changes to hours of work and remuneration

In 2020, a significant proportion of businesses reduced their employees' hours of work and rates of remuneration in response to the economic impact of Covid and claimed the government wage subsidy.

While many employees have returned to their previous hours and rates of pay, there is still a significant number who have not. It is important that employees' rates of pay and hours of work are formally recorded; this will help avoid uncertainty and clarify how long the new hours/pay are intended to stay in place. The best way to achieve this is to prepare a variation letter for them to sign and return. This sets out an employee's new hours of work and/or remuneration. They should of course seek independent legal advice.

Working from home

Covid has been extremely disruptive to our traditional ideas of what it means to be 'at work' and has been a catalyst for many businesses to introduce, or expand, flexibility for their employees. The introduction of working from home means that your employee's home should also be recorded as a place of work in their employment agreement. This re-classification, however, raises some other issues that should be worked through.

Health and safety is important. For home-based workers who can perform their roles remotely, the main issue is whether their home is adequately set up to be a place of work. For example, are their desk, chair and computer screens ergonomically correct? If not, you should consider whether your business is prepared to subsidise or cover the cost of purchasing this furniture.

We recommend you consider whether the health and safety provisions in your employment agreements are fit for purpose in light of your employees' homes being treated as a place of work.

Another issue is working from home expenses, such as internet and phone usage. You may wish to consider whether a weekly/fortnightly allowance is appropriate to subsidise employees' expenses when working from home. Tax consequences will also need to be taken into account.

You will also want to ensure that sensitive business information remains confidential despite being in your employee's home, and to ensure you have policies in place to address these issues.

What 'flexible working' looks like for a particular workplace is a major consideration. While many employees appreciate the flexibility that comes with working from home, you must take into account how allowing a large proportion of staff to work that way impacts your workplace culture and cohesion.

We recommend employers consider introducing flexible working policies in consultation with their staff in order to identify how often their employees can work from home and the rules and expectations around how they will stay connected while they are out of the office.

Overseas travel

With travel bubbles open (and sometimes closing) with Australia and the Cook Islands, both employees and employers must be mindful of the possibility of employees being unable to return from overseas trips due to unanticipated Covid outbreaks.

Employers should develop overseas travel policies, in consultation with staff, to establish the process for authorising or declining an overseas travel request. If overseas travel is allowed, employers should consider whether their employees should take their work computer with them (if they are capable of working remotely) so there would be minimal business disruption if they are unable to return for some time.

Final thoughts

Covid has thrown a spanner in the works in the way we carry out our day-to-day business. It has, however, given us all an opportunity to work in different ways. It is important to ensure your employment documentation reflects your workplace's new normal. +

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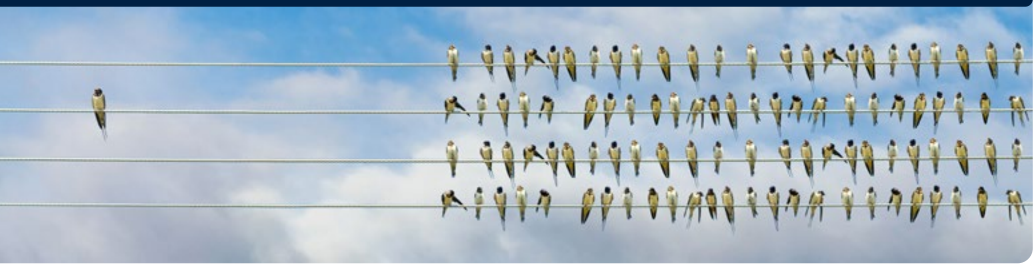

An independent trustee

Can be more important than you might think

Managing a family trust is not getting cheaper, nor is the paperwork and compliance being reduced. Trustees have legal duties, must give beneficiaries information and be accountable. It is tempting to think you can reduce costs by removing the independent trustee of your family trust. There can, unfortunately, be disadvantages.

The 'do it yourself' attitude

We all like to save time and money, but you do get what you pay for. Without an independent trustee, your family trust may not protect the trust's assets as you may expect.

Cook Islands case

The *Webb* case[1] arose in the Cook Islands under New Zealand law.

Mr Webb set up two trusts but, after he separated from his wife, the court ruled that the trusts did not prevent her claiming her half-share (as beneficiary) of the trusts' assets. Mr Webb had retained such power over the trust property that he could access the assets himself any time.

The court said that if Mr Webb had needed agreement from a 'truly independent person' such as an independent trustee, the result would have been different. In 2021, the Privy Council[2] agreed with the New Zealand judges in the Cook Islands' courts that Mr Webb had not really disposed of the property and Mrs Webb had a claim.

Clayton case

The *Webb* decision followed a New Zealand Supreme Court 2016 decision (*Clayton* case[3]). Mr Clayton had put commercial property into a trust. The court agreed Mrs Clayton could claim half of the trust assets as relationship property. This was because, although the assets were in a trust, Mr Clayton could get the property back any time he wanted.

These cases indicate the risks of not having an independent trustee who would counter the settlors' wishes to treat trust property as their own. Trustees must hold the trust property for all the beneficiaries, not just the person who established the trust.

Advantages of having an independent trustee

There are other advantages in having an independent trustee, particularly a professional trustee. The trustee can:

+ Advise about best practice
+ Remind about important things such as when to give information to beneficiaries (and when not to)
+ Help trustees meet other obligations, for example, retaining trust information as required by law
+ Spot things that need to be reviewed, and
+ Save cost if the trustee (if that person is the trust's lawyer) drew up the trust deed and knows the family.

Talk with your trustee now

If you have a professional trustee, we recommend you find out what they can do to help keep the trust running smoothly without undue cost.

The recent changes to trust law – the Trusts Act 2019 took effect on 30 January 2021 – have placed additional responsibilities on trustees. An experienced professional trustee can advise the most time-and-cost-efficient way to ensure your trust is compliant and effective. +

1 *Webb v Webb* [2020] UKPC 22.

2 The Privy Council in London is the body which hears appeals from Commonwealth countries that are too small to have their own top court.

3 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] 1 NZLR 551 (SC); [2016] NZSC 29.

Postscript

Mature workers toolkit

The government's business website has launched a 'Mature workers toolkit' to help employers to get workers aged 50 years-plus into small to medium-sized businesses.

The toolkit has a range of guidance, support tools and resources that employers can use to help attract, recruit and retrain mature workers. It includes:

+ A worksheet to help write compelling job advertisements
+ A build-your-own-policy for on-the-job learning
+ Tips on leading and working with mature workers, and
+ Case studies.

With more people working later in their lives, it's important that the skills and knowledge of mature people are retained in our workforce. Seek NZ's May Employment Report shows the demand for staff continues to increase. "Job ads increased by 5% month-on-month and are almost triple the volume that they were this time last year," reports Seek NZ.

Fifteen per cent of our population is aged over 65; this is expected to increase to 20% over the next 20 years. It is important that the value this group of people gives to business is acknowledged not only by employers, but also by their staff.

To find out more go to **www.business.govt.nz** and search for Mature workers toolkit. +

Bright-line test extended to 10 years

In March the bright-line test was extended to 10 years.

The bright-line test was established in 2015 to tax the profit made on selling residential property where sold within two years of purchase. The bright-line period was extended to five years for properties purchased from 29 March 2018.

Now, if you have a binding agreement to purchase on or after 27 March 2021 and you sell the property within 10 years, any profit will be subject to income tax.

For residential properties that are 'new builds' the five-year period still applies. Rules are currently being developed about which new builds qualify for the shorter bright-line period.

Do note however, in most (but not all) circumstances your family home is exempt from the bright-line test. The March 2021 announcement also saw changes as to how the family home exemption is calculated for properties subject to the bright-line test.

To know more about the bright-line test and how it may affect you, please don't hesitate to contact us. +

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