

PropertySpeaking

ISSUE 29
Summer 2018

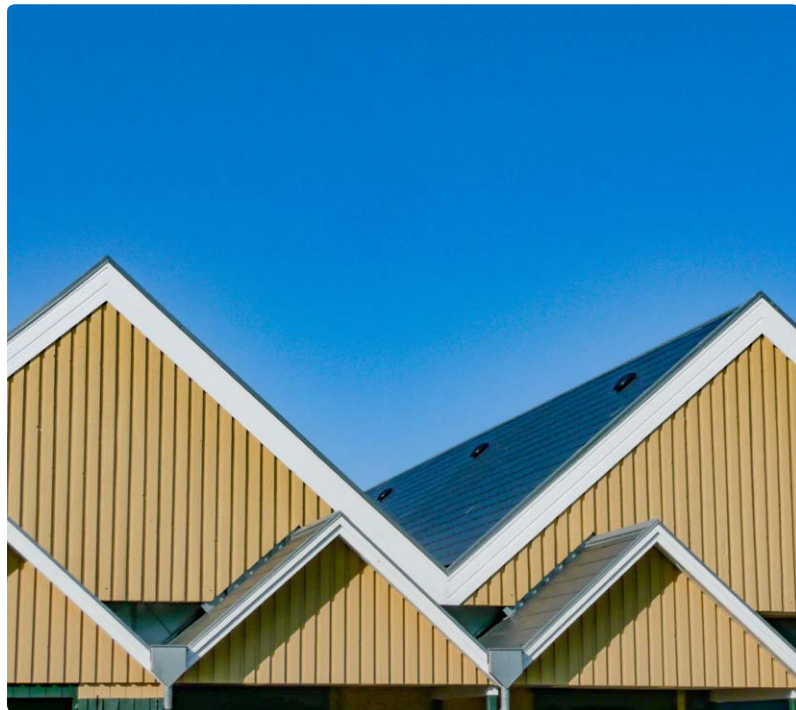
BOYLE MATHIESON
23 Lincoln Road, PO Box 21 640
Henderson 0650, Auckland
Ph: 09 837 6004 | Fax: 09 837 6005
office@bmlaw.co.nz
www.bmlaw.co.nz



BOYLE MATHIESON
LAWYERS | NOTARY PUBLIC

Welcome to the final edition of *Property Speaking* for 2018. Our focus in this issue is on residential property issues including new compliance steps relating to the Overseas Investment Amendment Act 2018 that came into force on 22 October, cross leases and points to consider before signing the agreement.

To talk further about any of the topics covered in this e-newsletter, please don't hesitate to contact us – our details are above.



Changes affecting every buyer of residential land

Overseas Investment Amendment Act 2018 now in force

We covered the Overseas Investment Amendment Bill in the Winter 2018 edition. The Bill has now become law, and is now the Overseas Investment Amendment Act 2018. It has been in force since 22 October; we discuss the implications of this legislation on you.

PAGE 2 >>

Buying a cross lease property

Quite different from a fee simple title

New Zealanders love to talk about property, and there are a multitude of topics we like to know about. The cross lease is just one of those many topics; this article explores the difference between a cross lease and a fee simple title.

PAGE 3 >>

Property Briefs

The agreement for sale and purchase

Checking the conditions

The chattels

Deciding a settlement date

Letting fees are now defunct

From 12 December tenants can no longer be charged a letting fee. The legislation banning letting fees was passed in late October.

PAGE 4 >>



DISCLAIMER: All the information published in *Property Speaking* is true and accurate to the best of the authors' knowledge. It should not be a substitute for legal advice. No liability is assumed by the authors or publisher for losses suffered by any person or organisation relying directly or indirectly on this newsletter. Views expressed are those of individual authors, and do not necessarily reflect the view of this firm. Articles appearing in *Property Speaking* may be reproduced with prior approval from the editor and credit given to the source.
Copyright, NZ LAW Limited, 2018. Editor: Adrienne Olsen. E-mail: adrienne@adroite.co.nz. Ph: 029 286 3650 or 04 496 5513.

The next issue of *Property Speaking* will be published in the Autumn 2019.

If you do not want to receive this newsletter any more, please

unsubscribe

Changes affecting every buyer of residential land

Overseas Investment Amendment Act 2018 now in force

We covered the Overseas Investment Amendment Bill in *Property Speaking's* Spring 2018 edition. The Bill has become law and is now the Overseas Investment Amendment Act 2018 (the OIA Act). It has been in force since 22 October.

The implication for you is that when you next buy residential property, there will be another layer of compliance to be completed before your property purchase goes through.

The OIA Act's primary purpose is to amend the definition of sensitive land to include 'residential land'. This means that people who are not New Zealand citizens, or who do not hold New Zealand, Australian or Singaporean residence class visas AND are not ordinarily resident in New Zealand must apply for consent to buy residential land in New Zealand. The underlying reason for this beefed-up legislation is to restrict foreign ownership of New Zealand land, and to encourage foreign owners to live in their properties rather than become landlords.

Defining residential land

The OIA Act defines residential land as a property that has a category of residential

'R' or lifestyle 'L' for the purpose of the relevant district valuation roll. It also includes a residential flat in a building owned by a flat-owning company regardless of whether the building is on land categorised as 'R' or 'L'.

Both buyers and sellers should be aware that even if the property in question is a large farm (which is already subject to OIA rules) the new rules may class that property as residential land also and a prospective purchaser must meet the eligibility test to buy residential land in New Zealand.

To determine if the land you intend buying (or selling) is residential or lifestyle, the Overseas Investment Office recommends you check the Quotable Value website [here](#). Enter the address into the search box to establish the property's building type.

Who is eligible to buy residential land?

Generally speaking, foreigners who are in New Zealand on a work, student or temporary visa are unable to buy residential land in New Zealand. This also includes trusts or companies that have 25% or more overseas ownership (beneficiaries and shareholders) or control (trustees and directors). However, exceptions do apply. These include:

- » Where a couple (married, in a civil union or in a de facto relationship) is buying residential land as relationship property:
 - If one partner is a New Zealand citizen, or has a residence class visa and is ordinarily resident in New Zealand, then the couple does not need to apply for Overseas Investment Office (OIO) consent to acquire the home
 - If one partner is an Australian or Singaporean citizen or permanent resident and they are ordinarily resident in New Zealand, then the couple does not need to apply for OIO consent to acquire the home, or
 - If one partner has a residence class visa or is an Australian or Singaporean permanent resident but is not ordinarily resident in New Zealand then only that partner needs to apply to the OIO for consent, the other partner need not apply.

These are likely to be the most common exceptions but there are others that may be available to you, we won't know until we sit down together and look at your situation.

All purchasers of residential land who are not New Zealand, Australian or Singaporean

Buying a cross lease property

Quite different from a fee simple title

New Zealanders love to talk about property. There are a multitude of topics relating to property that Kiwis have an intimate knowledge and understanding about which form the topic of water cooler and dinner conversation. The cross lease is just one of those many topics of conversation.

Traditional land ownership model

When you're considering buying a house, you don't envisage a cross lease form of ownership. You think of owning your own slice of land, subject only to the laws of New Zealand, and what your title says you can and can't do. This form of ownership is called a fee simple title.

A cross lease is not the same as a fee simple title.

What are the differences?

When you purchase a cross lease property, you buy a joint share of the underlying land together with the other cross lease holders and you lease from the other cross lease holders the rights to the house/flat/building you will occupy. The terms of this arrangement are governed by a lease registered against the title to the land.

The main difference from a fee simple title is that you are not the sole owner of your land or your home. You own the property jointly with others.

Your rights, obligations and powers in relation to the property are subject to those of other interests, and vary from situation to situation. Generally, you will need the consent of your fellow cross lease holders to carry out any structural renovations or any major maintenance or other works to the property you lease. More minor restrictions can extend to the number of pets you are able to keep.

There are general leasing principles to adhere to, such as ensuring that you don't create a nuisance and allowing the other cross lease holders to quietly enjoy their tenancy. A commonly neglected and overlooked provision is the requirement in most cross lease documents to have a joint insurance policy with the other cross lease holders.

How can you address your obligations?

There is nothing that can't be done without agreement and, of course, the cost of doing so.

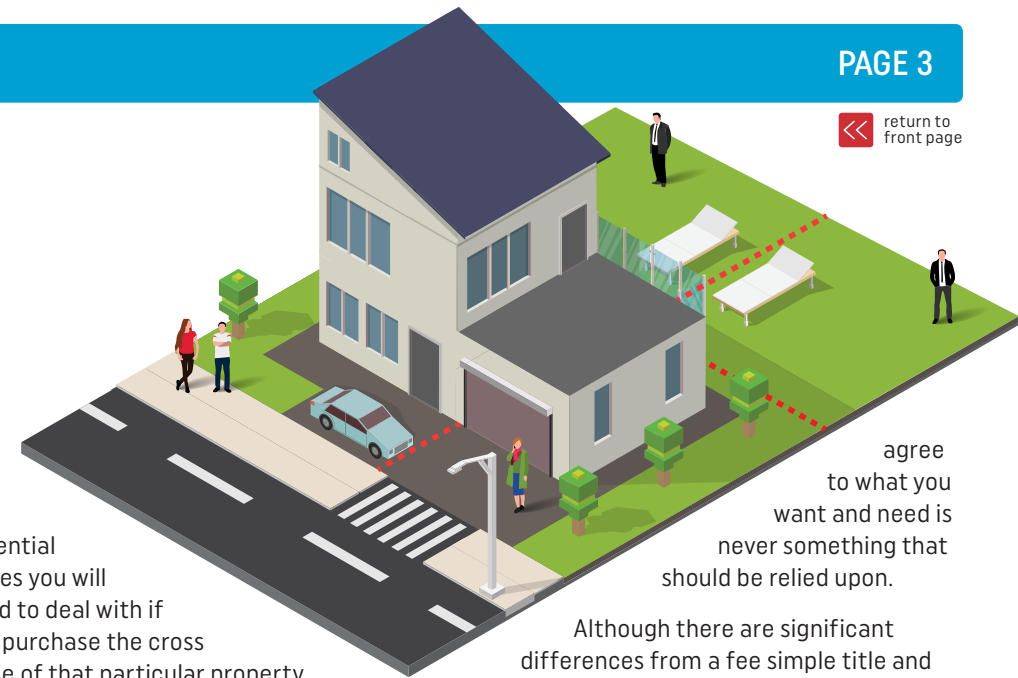
Initially, we recommend talking with us to discuss the issues associated with owning a cross lease property. This should happen *before* you buy, not afterwards. We will give you an overview of cross leasing and discuss

the potential issues you will need to deal with if you purchase the cross lease of that particular property. We will also review the cross lease document and advise you of its terms. It is imperative that you understand the nature of this form of property ownership before you are committed to purchase a property on a cross lease title.

There are other potential issues (which sit outside the scope of this broad-natured article) which we will need to check at this stage as well, such as the aerial plan for the cross leases to ensure that is accurate and doesn't result in a defective title.

It is better to have an understanding of the issues before you commit to purchase rather than attempting to remedy them after you take ownership.

Most matters relating to cross leasing can be dealt with by agreement between you and the other cross lease holders and their lawyers. However, the cost of attempting to remedy any issues may well be prohibitive for most people and getting other people to



agree to what you want and need is never something that should be relied upon.

Although there are significant differences from a fee simple title and sometimes difficulties with purchasing a cross lease property, many thousands of properties in New Zealand operate under this structure with no problems whatsoever. It is important though to understand how cross leasing works and how it differs from what many consider to be the traditional land ownership model.

If you are considering buying a cross lease, the most important thing is to be well-informed and enter into owning one with your eyes wide open.

A cross lease can often be converted to a fee simple title with consent of the other parties involved and their lawyers, and a surveyor. It can be a relatively straightforward process, however costs can vary significantly depending on the characteristics of your particular situation.

If you're considering buying a property on a cross lease, talk with us early on. It will be time well spent. ■

Property briefs

The agreement for sale and purchase

Checking the conditions

Given the significant financial commitment involved in purchasing a property, you want to make sure your investment is sound. One way of ensuring that a property is right for you is to include some conditions in your agreement for sale and purchase. If you do so, the purchase will only go ahead if your conditions are met. An agreement with no conditions included is 'unconditional' and you are obliged to complete the purchase once the agreement is signed.

Some common conditions that can be included in an agreement are conditions that give you time to sell your existing property, check what restrictions there are on the property's title, or get a building report before the agreement becomes unconditional.

Depending on your situation, you may be able to rely on the standard conditions on the front page of the agreement. You can also write additional conditions or alter the standard conditions on the 'Further Terms of Sale' page.

The wording of a condition can be critical and may determine whether you can rely on it to cancel your agreement. If not written precisely to cover your situation, you could

be obliged to satisfy the condition even where a 'deal-breaker' issue comes to light.

We should emphasise that the conditions are not there as an 'out' if you simply change your mind about a property purchase. Correct wording of conditions is vital. We will work with you to ensure you present the best possible offer to a vendor that also protects your interests if the conditions are not satisfied.

The chattels

The concept of buying 'everything but the kitchen sink' is one that does not apply to property purchases as a matter of course. Many household items that you will see in an

open home will not actually be sold with the property.

Only 'fixtures' are automatically sold with a property. Fixtures are items that are permanently fixed to the property such as showers and electrical wiring. All other moveable items are 'chattels' and are only included in the sale if specifically listed in your agreement for sale and purchase.

A standard agreement includes a list of suggested chattels, such as the stove and light fittings. This list can be tailored to include any chattel you wish to buy with the property, if the vendor agrees of course.

It is not always obvious whether an item is a chattel or a fixture. Misunderstandings

can easily arise and lead to a later dispute. To help avoid this, we recommend carefully checking the chattels list in the agreement. When in doubt about whether something you wish to buy is a chattel or a fixture, you should include it in the chattels list. This way, you will be clear what items you are buying with the property.

Deciding a settlement date

Having made all the arrangements to buy or sell a property, making a quick decision on the settlement date may be a priority. Before you decide, however, do think hard about the time needed to complete the 'behind-the-scenes' work for the transaction, including our work preparing for the property transfer.

The time needed before settlement date will be greater in transactions involving:

- » Mortgages or home loans as your lender will need time to process the relevant documents
- » KiwiSaver funds as some KiwiSaver providers can take more than three weeks to process an application to withdrawal funds
- » Property where a tenant needs to be given notice to move, which is generally a minimum of 42 days, and



◀◀ Continued from page 2

Changes affecting every buyer of residential land

citizens will need to be ordinarily resident in New Zealand. You will be ordinarily resident if:

- » You hold a residence class visa in New Zealand, or a permanent residence class visa in either Australia or Singapore (not a work visa, a student visa or a work to residence visa)
- » You have been residing in New Zealand for the 12 months preceding the date the agreement for sale and purchase was signed
- » You have been present in New Zealand for 183 days of the 12 months preceding the date the agreement for sale and purchase was signed, and
- » You are a tax resident in New Zealand (this generally requires being present in New Zealand for 184 days from the 12 months preceding the date the agreement for sale and purchase was signed).

What does this mean for you?

For all residential land purchases where the agreement for sale and purchase was signed after 22 October 2018 you will be required to sign a statement that you are eligible to purchase residential land in New Zealand. We are then required to hold that statement for seven years after the purchase is settled.

If you do not sign the statement, then we will not be able to complete the purchase for you. Likewise, if we have cause to believe that the information provided may be incorrect, we will need to investigate. To take this additional compliance into account, we recommend that in most cases a minimum 15 working days condition be included on agreements for residential property to allow the appropriate investigations to take place and for consent to be applied for if necessary.

Some useful information, checklists and the statement are available on the LINZ website [here](#). ●

◀◀ Continued from page 4

Property briefs

- » A vendor or purchaser who lives out of town as they may be delayed in meeting their lawyer.

Also, if you are selling your house before buying another, you may want a delayed settlement or for settlement of both transactions to occur on the same day to ensure you have somewhere to go.

It is important to get the settlement date right at the outset. The other party may not agree to change the settlement date later and, if you are not prepared by settlement date, you may have to pay the other party compensation.

To help avoid this situation, common practice is to set the settlement date as a certain number of working days from the date the agreement becomes unconditional. The number of working days required ultimately will depend on what work needs to be done

prior to settlement. If you need assistance, we can offer advice on how much time you likely will need for your particular transaction.

Letting fees are now defunct

From 12 December 2018 tenants can no longer be charged a letting fee. The legislation banning letting fees was passed in late October.

Many tenants paid their landlord a letting fee of a week's rent plus GST at the beginning of their tenancy. These letting fees cover the costs of the landlord's letting agent or lawyer in setting up the tenancy.

Whilst tenants will be pleased with this change, landlords have given the news a lukewarm response saying that the letting fee ban may lead to rent rises. ●



◀◀ return to front page