

CONDITIONAL AGREEMENTS

We see a lot of clients who enter into agreements to buy businesses or properties without doing basic background checks, or making the agreement conditional on certain events.

Except for a few instances, the general rule when it comes to buying anything is caveat emptor – let the buyer beware.

Both forms of standard agreements (business or property) contain implicit finance conditions. This should almost always be used, even if buyers have pre-approval from their bank. It is not unusual that such pre-approval contains conditions such as approving the purchase agreement. If there is something about the agreement that the bank doesn't like, then it can refuse finance.

Business agreements also have a built-in condition about the buyer approving the lease of the premises (if there is one). It will usually not be possible to cancel the agreement using this condition if finance is not approved. That is because of a term in the agreement that says where a condition is inserted, the person for whom it is inserted in favour of must do all things reasonably necessary to satisfy the condition.

This applies to land contracts also. A high profile case involved a buyer purchasing an expensive property in East Auckland and made it conditional on their own house selling by a certain date. To save money, the buyers listed their own home on TradeMe and did not utilise the services of an agent. After a few months, when their own home did not sell, they cancelled the purchase agreement for failure of the condition to sell their home. The matter went to the Court of Appeal which ruled that because the buyers had not listed their property with an agent, they had not done all things reasonably necessary to allow the sale condition to be satisfied. They were financially liable to the sellers.

A condition that is often inserted by agents into agreements to buy land relates to the buyer's solicitor's approval of the agreement. Another word of caution applies here. Courts have ruled that if the agreement is of standard form (i.e. issued by the Law Society in conjunction with the Real Estate Institute) then there is nothing usually for the solicitor to approve. The condition then becomes illusory, and is not really a condition at all. A better condition is due diligence, which will allow the buyer to investigate all aspects of the property (or business), within, say, 15 working days.

Provided the buyer does all things reasonably necessary to satisfy the due diligence condition, they cannot be criticised if the agreement comes to an end for its non-satisfaction.

Whether it's the sale of a business or land, most agents will insist on conditions, as a matter of good practice. The best practice for either party (buyer or seller) is not to sign any agreement until the terms of the agreement have been discussed with your lawyer first.

Tip

Be careful with signing wills that are self-prepared. The new Wills Act has strict signing requirements which must be followed for the will to be declared valid by the High Court.