

Buying or selling property in NSW – when to involve your lawyer

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Date: Monday March 15, 2021

Buying and selling a residential property is often the largest financial decision you will ever make, particularly on the Northern Beaches. The number of things you need to consider when going through this process can be intimidating, particularly when it is your first time buying or selling, or if it has been a long time since you last went through this experience.

At what point should I engage my lawyer in the process?

Involving your lawyer sooner rather than later can assist you and can improve the chances of a smooth transaction or decrease the chances of something going wrong.

It may initially only be to provide guidance on some of the key issues you should bear in mind before starting the process or it could be to give you an outline of the significant steps in the process.

There are some important milestones during the property transaction where you will need to involve your lawyer.

Crucial milestones when buying a property

When buying property, the best time to involve your lawyer will depend on whether the property is being sold:

1. by private treaty (ie, by negotiation) where you exchange with a cooling off period;
2. by private treaty requiring an unconditional exchange;

3. at auction; or

4. if you are making a pre-auction offer.

1. Private treaty with a cooling off period

A private treaty sale is where the property is actively being marketed for sale, and the property is not being sold at auction. You will not be locked into the contract until exchange occurs.

In NSW, when purchasing residential property, you are entitled to a 5 day cooling off period after exchange, unless this right is waived by you. You would be required to provide a 0.25% deposit on exchange.

During that cooling off period, you could pull out of the contract for any reason and you would lose only that 0.25% deposit (rather than the full 5 or 10% deposit). The vendor is locked into selling the property to you and could not pull out of the contract.

If there is a rush for you to exchange contracts to secure the property, then provided you do not waive your right to a cooling off period, your lawyer would have time during the cooling off period to review the contract and advise you on its terms. There is also scope to have parts of the contract amended if negotiated with the vendor during that cooling off period.

If you or your lawyer find any adverse issue with the property during the cooling off period, you could exercise your cooling off rights, meaning you pull out of the contract and forfeit your 0.25% deposit.

Once the cooling off period expires, when you are required to pay the balance of the deposit, then you will be locked into the contract.

2. Private treaty with unconditional exchange

An unconditional exchange is where the vendor or agent insist upon you waiving your cooling off rights and providing the full 5 or 10% deposit and a section 66W certificate on exchange. A s66W certificate is a certificate signed by a solicitor (or conveyancer) affirming your agreement to waive the cooling off period.

Once an unconditional exchange occurs, you will be locked into the contract and you would risk losing your deposit if you changed your mind about the purchase.

It is possible to proceed with negotiations before your lawyer needs to be engaged to review the contract. There is typically time between reaching an offer and acceptance (where you agree to particulars such as the purchase price, settlement date, inclusions in the sale, etc.), and an exchange of contracts.

During the time between offer and acceptance and an exchange of contracts (at which point you will pay your deposit), your lawyer will be able to review the contract and seek any necessary amendments to the contract for you.

This way you will know with certainty that you can secure the property at a price acceptable for you before engaging your lawyer and incurring any costs.

3. Buying property at auction

If you are the successful bidder at auction, you would be locked into the contract from the time of exchange. You would not be entitled to any cooling off period.

If you are serious about bidding at an upcoming auction, you should engage your lawyer to review the contract and seek any amendments to the contract prior to the auction. This way you can bid at auction with confidence that you know what you are purchasing, and there are no hidden issues lurking in the contract.

4. Pre-auction bid

Typically, if you are making a pre-auction bid, a vendor would not agree to exchange unless you exchange unconditionally (waiving any cooling off period). This is because a vendor would not be able to sell the property at auction if the property was subject to a contract with a cooling off period.

Making a pre-auction bid is an identical situation to purchasing by private treaty where the vendor or agent requires an unconditional exchange. The only difference is that the timeframe between offer and acceptance may be shorter than usual. With the right lawyer, this timeframe can still be met.

Crucial milestones when selling a property

When selling residential property in NSW, a real estate agent cannot commence marketing the property until a Contract for Sale for the property has been prepared. At a minimum, you will need to instruct your lawyer to prepare the Contract for Sale once you have decided the date the agent will commence marketing the property so that the contract will be available on that day.

A contract can be prepared in as little time as a day, but ideally, you would instruct your lawyer about one week before the first open.

Speaking to your lawyer early, once you have made the decision to sell, will ensure that you are organised and in the best possible position to sell without any outstanding issues which may deter potential purchasers.

Some of the reasons that may require you to consider speaking to your lawyer early

Swimming pools

If you have a swimming pool on the property that has not been registered on the Swimming Pool Register, or that you have not had inspected to obtain a Swimming Pool Compliance Certificate.

Tenants

If you have a tenant in the property, your lawyer will be able to outline options available to you to sell the property with the current tenant remaining, or to sell allowing a possible purchaser to move into the property after completion.

Recent development/renovations/building works

If you, or a builder engaged by you, completed any home building works to the property in the past 6 years where the value of the works exceeded $20,000, then speaking to your lawyer early can ensure that you comply with your obligations when selling. It may also help to remove issues that may deter potential purchasers.

Alternately, if you applied for a Development Application for building works which have not yet been undertaken, your lawyer can advise you of your options.

Unauthorised works

If you know of any non-complying improvements on the property that have not been approved by Council, your lawyer can advise whether it would be appropriate to apply for a Building Certificate prior to selling.

Unknown location of the Title Deed

Where you do not know the location of the Title Deed (also known as a Certificate of Title), it may be necessary to undertake further searches or even apply for a replacement. Obtaining a replacement Title Deed can take time. To ensure this does not delay completion of your sale, early

steps should be taken to attempt to locate the Title Deed or apply for a replacement.

Encroachments

If you are aware of any possible encroachments, then early steps should be taken so that this may be outlined in the contract. An encroachment may include where one of your structures crosses the boundary onto a neighbouring property, or a structure on your neighbour's property crosses the boundary onto your property.

Building over or near sewer main

If you know that your home or another structure on your property is built very near or is built over the sewer main, then it may be necessary to obtain a letter from Sydney Water or the relevant water authority confirming this is permitted.

Tax implications

If the property you are selling is not or was not your principal place of residence, and you are possibly liable for land tax or capital gains tax, your lawyer will be able to provide further advice for you.

In summary

Like with many things, there are risks associated with buying and selling property. Speaking to your lawyer early is an important step in the process. Doing so, sooner rather than later, will help to ensure that your purchase or sale proceeds smoothly and without any issue.

Get help from a property lawyer

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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