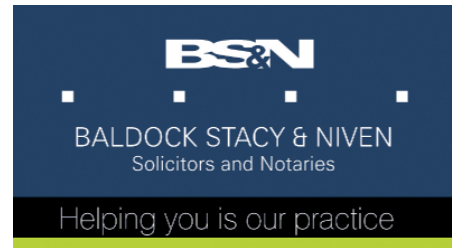


Notes on selling a property

For the use of the clients of
Baldock Stacy & Niven



1. PREPARING FOR SELLING

The law requires the Real Estate Agent (or the seller if there is no agent) to have a copy of the contract available for any proposed buyer to read. A contract takes about 3 business days to prepare and has attached to it a title search, a zoning certificate and a drainage diagram.

2. ENTERING INTO A CONTRACT

The contract prepared by the seller's solicitor is usually in the form held under joint copyright by The Real Estate Institute of New South Wales and The Law Society of New South Wales. For convenience, it is referred to here as "the contract". Normally, contracts are made binding by the seller signing the original and the purchaser signing an exact copy of it, and those contracts being exchanged and dated and the deposit being paid. Each party then holds a contract signed by the other party.

3. SMALL PRINT IN THE CONTRACT OF SALE

The form of contract is a multi-purpose one. It can be used with only small changes for the sale of vacant land anywhere in the state worth only a small amount as well as for the sale of a very expensive house or factory. Many of the clauses are there to protect both the purchaser and the seller if something unexpected occurs. Very often they operate to prevent trouble. The basic printed clauses are accepted as keeping a reasonable balance between the interests of both seller and buyer.

4. VENDOR DISCLOSURE

Vendor Disclosure Regulations require the seller of any land (whether residential property or not) to disclose certain matters in the contract and to make certain warranties (or promises). The Regulations were introduced in an attempt to simplify conveyancing and reduce delay in the time it takes to make a contract

binding. They require a seller to attach the following documents to the contract and, if they are not attached, the purchaser may cancel the contract within 14 days of the date of making the contract.

The usual documents to be attached include:

- (a) a zoning certificate under s149(2) of the Environmental Planning and Assessment Act, 1979;
- (b) a drainage diagram showing where the sewer lines are in relation to the land;
- (c) a copy of the Title Deed where the land is under the Real Property Act;
- (d) an official plan of the land ;
- (e) a copy of all documents creating easements over the land (right of way etc.) and covenants; and
- (f) if it is a sale of a Strata Title unit, a copy of the Strata plan showing all the lots, a copy of the Title Deed for the strata lot being sold, and a copy of the Title Deed for the common property.
- (g) If the building was built within the last 7 years, or is being sold by an owner builder, or if building work has been carried out on the property in the last 7 years costing over \$12,000, a certificate of Insurance under the Home Building Act.

5. SELLER'S WARRANTY AND SMOKE ALARMS

The law requires you as a vendor (seller) to give a warranty (promise) to the purchaser that your property is not affected by anything that could justify the local council making an upgrading or demolition order in relation to any building or structure on the land. If a purchaser finds before settlement that you are in breach of this warranty, the purchaser can rescind (cancel) the contract.

From 1 May 2006, new legislation in NSW requires owners of all houses, flats and units to ensure that smoke alarms are installed in their properties. We will prepare the proposed contract on the assumption that there is a working smoke alarm properly fitted in the property. If this is not the case, you should tell us immediately. For more information on the new law relating to smoke alarms there is information on the internet at www.planning.nsw.gov.au/smokealarms or alternatively please contact the writer.

6. STRATA TITLE

If you are selling a strata title unit, you will need to let us know if you are aware of any unusual likely financial

liabilities of the Owners' Corporation or if the Owner's Corporation has made any special levies which are still outstanding. If there have been special levies we need to disclose this in the contract.

7. INVESTMENT PROPERTIES

If you are selling an investment property, several other issues need to be considered:

- (a) *Capital Gains Tax*. This should be discussed with your accountant or us.
- (b) *Land Tax*. We need to discuss land tax with you, as if there is a liability for land tax, the amount to be adjusted needs to be set out in the contract.

8. HOME BUILDING ACT

The law requires a certificate of insurance to be attached to the contract in certain situations. We need to know if:

- (a) the house or building was built less than 7 years ago;
- (b) you built the house or building as an owner builder; or
- (c) you have carried out extensions or building work on the property in the last 7 years and the "reasonable market cost" of the labour and materials was over \$12,000.00.

9. GOODS AND SERVICES TAX (GST)

We are not accountants and do not give advice in relation to GST matters. In certain circumstances the sale of a property may incur GST. As the contract is expressed to be GST inclusive this may result in you having to remit GST to the government and this may not be recoverable from the purchaser. You should contact your accountant to ensure that no GST is payable.

10. THE DEPOSIT

This is usually 10% of the purchase price. It is usually paid to the agent to hold as depositholder until completion. The deposit can be more or less than 10% of the purchase price if the parties agree. Sometimes it is reduced by agreement if the purchase is going to take a long time. If there is no agent, the deposit is paid to the seller's solicitor. The parties can agree to the deposit being invested until settlement. Usually, the interest is shared equally between the seller and you.

The agent does not account to the seller or the seller's solicitor for the deposit until after settlement when authorised in writing. Usually the agent deducts the selling commission and pays the balance of the deposit as directed by the seller's solicitor.

11. PEST CERTIFICATE AND BUILDING INSPECTION

Usually a prospective purchaser will obtain these before contracts are made binding. In most cases, the purchaser takes the buildings



in their present state and condition and with any pest infestation existing when contracts are made unless there is a clause making the contract subject to the obtaining of a satisfactory building report and pest certificate.

12. THE COOLING-OFF PROCEDURE

The cooling-off period ends at 5.00pm Sydney time on the fifth business day after the day the contract is made. The five business days cooling-off period may be waived, shortened or extended, and different rules apply in each case. To waive the cooling-off period the purchaser must give the seller a certificate called a s.66W Certificate.

There is no cooling-off period for a contract of sale of residential property if:

- (a) at or before the time the contract is made, the purchaser gives to the seller (or the seller's solicitor or agent) a s66W certificate; or
- (b) the property is sold by public auction, or
- (c) the contract is made after the property has been passed in at a public auction, provided the contract is made on the same day as the auction; or
- (d) the contract is made in consequence of the exercise of a valid option.

In order to withdraw within the five business days, the purchaser must give notice of rescission in writing. The notice does not have to give any reason for the rescission. The consequences of cooling-off are that the contract is ended from its beginning, the purchaser forfeits 0.25% of the purchase price to the seller, and the purchaser is entitled to a refund of the balance of the deposit. (One quarter of a percent of \$250,000.00 is \$625.00).

13. EXCHANGE OF CONTRACTS

There are two major steps in a purchase. The first is making a binding contract (called "exchange"). The second is settlement of the sale. In between exchange and settlement the purchaser makes title searches and enquiries about the property and we arrange for any discharge of mortgage to be prepared. Settlement occurs when the purchaser pays you the balance due under the contract and receives title to the property.

14. INSURANCE AND PASSING OF RISK

Unless otherwise stated in the contract, the purchaser buys the property in the state and condition it is in at the date of the contract. As lawyers say "the Purchaser buys it as they find it." Between the date of contract and the date of settlement, it is the duty of the seller to use reasonable care to keep the property in a reasonable state of preservation, given its condition when the contract was made. A clause in the printed contract provides that the seller is not liable for any fair wear and tear of the property during this period.

The risk of damage to buildings and other fixtures remains with the seller until settlement or when the purchaser takes possession. Possession includes occupation until settlement, or receipt of income from the property.

When buildings and other fixtures are substantially damaged after the making of a contract for the sale of land, and before the risk of damage passes to the purchaser, the purchaser may rescind the contract by notice in writing within 28 days and in that case all money paid by the purchaser under the contract must be repaid.

15. FIXTURES

All fixtures are included in the sale without having to be mentioned specifically. In law a fixture is something attached to the land or building that cannot be either simply lifted up and taken away, or unscrewed and taken away without doing any damage. Most electric stoves are wired in so they are fixtures, but most refrigerators are plugged in, so they are not fixtures. The safest course is to refer in the contract specifically to items about which there can be any room for doubt such as the following:

- * curtains
- * easily removable floor coverings
- * light fittings
- * bookshelves and cupboards not attached to walls
- * fire ornaments and fire tools
- * portable garden shed
- * dog kennel
- * children's play equipment
- * blinds and other window furnishings
- * sun dial and bird bath
- * above-ground swimming pool
- * portable barbecue
- * garden furniture
- * television antenna
- * any other items that look like fixtures but are not.

16. COUNCIL RATES

The usual provision in the contract is that rates should be adjusted at the date of possession or any other date the parties agree. We will calculate the proportion of rates payable by you for the days up to settlement and the amount payable by the purchaser for the number of days from settlement until the end of the rating period. Interest is payable on outstanding rates.

17. WATER SERVICE CHARGES

As with Council rates, the usual provision in the contract is that water service charges should be adjusted as at the date of completion. Water Authority charges start from 1 July each year and bills are issued quarterly. Outside the Sydney Water and Hunter Water areas, Local Councils are responsible for water rates which are included in the Council rates assessment. There are rebates and partial

rebates available for pensioners liable to pay water service charge. Details of these are best obtained direct from the appropriate Water Authority.

For a house supplied with water by a Water Authority, the purchaser obtains a certificate about service charges. The certificate shows the service charges, the environmental levy and the water usage charges for the current quarter. It also shows if the account has been paid. The Water Authority does not provide a meter reading service on request, and a water usage bill is issued only after the end of the quarter to which it relates. Usually water usage is adjusted on settlement on the basis of the average water used over the previous period.

18. REQUISITIONS

The purchaser's solicitors submit these questions to us. Some ask you to do what you are already obliged to do under the contract. Others, however, ask important questions such as whether there are any disputes with neighbours over fences. Occasionally, the answers reveal something that could not have discovered by inspection the property and is of value to the purchaser. They are usually sent to us after exchange of contracts. A seller who does not answer requisitions honestly may be liable for any consequential loss suffered by you.

19. OCCUPATION BEFORE SETTLEMENT

Sometimes it suits both the seller and the purchaser for the purchaser to take possession of the house before settlement. A clause in the printed form of contract provides what is to happen in this situation. It is like a very short lease. The Purchaser is to insure the property and not make any structural changes to it.

Normally the seller requires an occupation fee based on a market rental for the property and that occupation fee is paid on settlement in addition to the balance of the purchase money. Occasionally it is paid weekly to the agent. The clause provides for rates to be adjusted from the date of possession unless the parties agree otherwise. Normally the arrangement about occupation is confirmed in letters between the solicitors or included in the contract.

20. THE TIME OF SETTLEMENT

The contract usually provides for an agreed settlement date. Sometimes, however, no settlement date is provided. It may be impossible at the time of exchange of contracts to be certain when settlement can take place because of uncertainties about when the loan money will be available, how long it will take to have a survey done, the searches and enquiries made, and so on.



If either party does not settle on the due date, there is a method that can be used to require the other to complete the sale. The method is to give the other party a "Notice to Complete". This notice has the effect making time "of the essence". The Notice must allow a reasonable time for settlement. Usually that is two weeks from the date of the notice. Such notices are rarely necessary. When one is served great care needs to be taken so the differences between the parties don't become so contentious they end up on Court.

Many contracts provide settlement must take place within six weeks. Failure of either party to settle on the stipulated date or within a stipulated time can give rise to a claim for damages for the loss suffered by the non-defaulting party. If a contract provides a date for settlement or a time within which settlement must take place and then states that the date or time stipulated is "of the essence" and for some reason settlement doesn't take place exactly on that date or within that time and the parties do not agree to disregard the breach of the clause, then the party not in default has a choice of remedies including claiming damages or rescinding the contract and claiming forfeiture of the deposit.

21. PROCEDURE FOR SETTLEMENT

When a date for settlement is known, the balance payable to you on settlement should be calculated. The usual practice is for the purchaser's solicitors to make the calculations and submit them to us for approval. Settlement normally takes place where the seller's title deeds are located.

On settlement the balance of the purchase money (plus or minus adjustments for rates etc) is paid in exchange for the Title Deeds and transfer documents. The money is paid in such a way as to enable your mortgage debts to be repaid on settlement so that mortgage discharges can be handed over. Of course you pay the costs of registering the discharges of any mortgages. Usually the money is paid by bank cheque - that is, a cheque drawn on the bank's own funds, as distinct from a private account.

22. PROCEDURE AFTER SETTLEMENT



We usually contact you to say that settlement has taken place. Usually you will have already given the keys to the house to the Agent. We then write to you setting out full details of the

money paid over on settlement, and how it was calculated, if this information has not already been provided. The Purchaser must prepare a Notice of Sale that must be lodged with the Transfer to enable the Transfer to be registered. The Office of Land and Property Information uses that form to notify the Local Council, the Water Authority, the Valuer General and Rural Lands Protection Boards of the fact of the transfer.

23. TELEPHONE, ELECTRICITY & OTHER SERVICES

It is up to you and not us to attend to the other matters incidental to buying a house including transfer of the telephone service, disconnection of electricity and gas, redirecting mail from the Post Office, and so on.

About Us - Baldock Stacy & Niven

Who are we?

Baldock Stacy & Niven is a firm of lawyers with offices in Western Sydney and in Central Western New South Wales. We have a heritage going back more than 100 years to the firm's founding by Herbert Henry Lee in 1891.

What is our aim?

Over a century after the firm's founding our focus remains unchanged: a belief in the importance of understanding our client's needs, of adapting to the continuing challenges of business, and of delivering quality professional services in a timely and cost effective manner.

Who are our clients?

Baldock Stacy & Niven has a wide range of city and country clients from various industries and lifestyles. We offer a broad legal practice offering professional legal advice and service in many varied areas.

How do you arrange to see us?

If Baldock Stacy & Niven are already your solicitors please ring and speak to the solicitor you normally deal with.

If Baldock Stacy & Niven are not your solicitors, please ring Stuart Niven in our Parramatta Office on (02) 9891 6444 to make an appointment.

The material in this information sheet is not a replacement for legal advice and is only general in nature. No person should act or not act solely based on this information sheet. It is not legal advice and your possession of this information sheet does not create a client/lawyer relationship. If you would like to discuss your particular circumstances please contact Baldock Stacy & Niven and we would be pleased to be of assistance to you