

NOTES ON SELLING A COMMERCIAL PROPERTY

For the use of the clients of Baldock Stacy & Niven



1. PREPARING FOR SELLING

For commercial properties, there is no requirement that a contract be prepared by the Vendor (Seller) prior to advertising the property. Sometimes a contract is made available and sometimes it is not. We suggest that you speak to the agent about whether a contract should be prepared prior to the sale.

2. ENTERING INTO A CONTRACT

The contract prepared by your 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 you signing the original and the buyer 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 you and the buyer 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, you 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 property, 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.

5. STRATA TITLE

If you are selling a strata title property, 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.

6. TAXES

As you will be selling a commercial 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.

7. 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.

8. 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.

9. 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.



10. 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, we make title searches and enquiries about the property and arrange for payment of stamp duty and for signing of mortgages in readiness for settlement. Settlement occurs when you pay the seller the balance due under the contract and receive title to the property.

11. 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.

12. 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:

- * easily removable floor coverings
 - * light fittings
 - * racking and shelving
 - * air conditioning
- any other items that look like fixtures but are not.

13. 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.

14. 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.

For a property 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 based on the average water used over the previous period.

15. 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. Occasionally, the answers reveal something that could not have been discovered by inspection of 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 the purchaser.

16. 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, a method 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 of 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 do not become so contentious they end up on Court.

Many contracts provide that 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.

17. 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.

18. PROCEDURE AFTER SETTLEMENT

We usually contact you to say that settlement has taken place. Usually you will have already given the keys to the property 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.

DISCLAIMER

This Guide has been prepared to help you to understand the legal aspects of selling a commercial property. It is not intended to be a kit setting out the procedures for buying or selling a commercial property and therefore does not seek to deal comprehensively with each step along the way nor with all the problems and difficulties, which need to be examined in the course of selling.

You should not rely on the contents of this publication without first obtaining our advice.