

# Terrace End Law.

Below is additional information entitled **WHAT YOU SHOULD KNOW WHEN BUYING A COMMERCIAL PROPERTY** in relation to Conditions, Insurance, Title, Boundary, Finance, Land Information Memorandum (LIM), Building Records Check, Building Survey /Property Inspection, Engineer's Report, Due Diligence, Leases, Value, Chattels, Cash Out Clause, Going Unconditional, Deposit, Vendor Work, Caveat Emptor – Buyer Beware, Risk Management, Type of Ownership, Settlement Process, Land Transfer Tax Statement, Conflicts of Interest. We especially refer you to the sections about Due Diligence and Land Information Memorandum (LIM).

## **WHAT YOU SHOULD KNOW WHEN BUYING A COMMERCIAL PROPERTY**

### **Conditions**

It is quite common for an Agreement to purchase a Property to be entered into subject to various conditions which the Purchaser usually asks the agent to include or which we recommend if given the opportunity to peruse an Agreement before it is signed. Below are some of the more common conditions. If, on reflection, your Agreement is not subject to matters which you need to investigate more fully, please be certain to let us know so that we can consider how best to safeguard your interests.

### **Insurance**

We urge you to obtain full cover acceptable to you and your lender on the buildings on the Commercial Property before you go unconditional. This will be a requirement of any lender taking security over the property and loan funds cannot be drawn down for settlement without full replacement insurance cover acceptable to the lender taking security.

Some mainstream insurance companies are refusing to offer cover on certain buildings, eg old buildings, buildings built without building permits or building consents, buildings with a history of flooding, boarding houses etc.

Insurance Companies will not insure properties owned by any person who has a criminal conviction for dishonesty. If this affects you or a Co-Purchaser you are buying property with please urgently advise so the risk of you not obtaining adequate insurance can be considered in a timely manner.

If you cannot provide your Lender with an acceptable insurance certificate in your full correct name(s), with the correct address of the property before the date of possession and settlement, we cannot send a copy to your Lender and your Lender will not advance loan monies on the security of the property you are purchasing for settlement.

### **Title**

If the ADLS Agreement has been used then if you have any concerns in relation to the Title these must be addressed within 10 working days from the date you signed the Agreement. The requisition period expires on that date. Please raise any queries that you have with us as soon as possible, but ideally before the Agreement becomes unconditional as not all matters of concern can be requisitioned.

### **Boundary**

Please pay particular attention to the boundaries to your property and if necessary have the boundaries checked to ensure that they align with the legal boundaries. If you cannot locate the survey pegs you would need to engage a surveyor to verify location and accuracy. This

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is particularly important for commercial property where buildings are often right on the boundary - you must ensure there is no encroachment.

## **Finance**

If your Agreement is subject to a finance condition then, if you have not already done so, please advise us of the name of the lender/mortgage broker arranging your finance (together with his/her mobile and email addresses). Please also advise us whether or not you have raised the finance unconditionally prior to the finance date and keep us informed of progress/difficulties that arise. Your banker or broker will need to email us a letter of confirmation regarding unconditional finance approval before we can satisfy any finance condition. If you avoid the agreement for failing to arrange finance you may have to provide a satisfactory explanation of the grounds you rely upon, together with supporting evidence, immediately upon request by the vendor.

If your Agreement is not subject to a finance condition we will assume that you have or will make your own arrangements to finance the property and would appreciate your advice in due course as to the arrangements that you have made, if you have not already done so.

## **Land Information Memorandum (LIM)**

If your Agreement is subject to a LIM condition you will have to order the LIM report within 5 working days of signing the Agreement but the sooner the better.

If the ADLS Agreement has been used and the LIM box marked "yes" on the front page then clause 9.2 of the Agreement sets out the procedure that must be followed if you wish to withhold approval to the LIM report. If you don't give notice within the strict timeframes of clause 9.2 as modified by the Agreement stating the particular matters in respect of which approval is withheld you will lose the right to withhold approval.

If your Agreement is not conditional on a LIM, we still recommend that you procure a LIM (this is the best and most comprehensive report available). Below is a table summarising the sort of information you can expect from a LIM.

<b>LIM (Land Information Memorandum)</b>
(10 working days to complete)
Cost \$442.00 (for residential properties)
All Local Authorities must supply these in accordance with Local Government Official Information and Meetings Act 1987 for all properties.
Involves the following:
• Records Check
• Building Records Check
• Plan and Information Check
• LIM Officer Check
- Roading Information
- Rating Information
- Contamination Consents
- Building Warrant of Fitness
- Ground Bearing Pressure
- Minimum Floor Levels
- Aerial Photograph
- Unauthorised Buildings
- Swimming Pools

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- Earthquake Prone Buildings
- Other Property Conditions
• Planning Check - District Plan Zoning - Land Use Consents
• Environmental Health Check - Health Licences
• Drainage Check - Water, Stormwater and Sewer Services
• Liquor Licences Check
• Laboratory Check - Contamination Concerns - Trade Waste
• By Law Check - By Law Compliance
• Notifications from other Statutory Organisations Check

**Please note:** The accuracy of the information supplied in a LIM is entirely dependent on the quality and availability of the information held by the relevant local authority about the property. Some records are inevitably missing due to fires and misfiling. Unauthorised building work may not be mentioned in the report because the Council may be unaware of it.

You must also carefully examine the whole of the report you receive especially a LIM (ie not just Building Records Check) and identify all and any causes of concern, eg any reference to erosion, avulsion, falling debris, subsidence, slippage, alluvion, inundation, hazardous contaminants, Weathertight Homes Resolution Service, unauthorised buildings, earthquake prone buildings, notifications, outstanding requisitions, etc.

## **Building Records Check**

- Prior to 1991 Building Permits were issued on application, for work carried out on a property. Note that, Code Compliance Certificates were never issued for work done prior to 1991 in accordance with a Building Permit.
- From 1991 onwards Building Consents were issued, on application, for work carried out on a property. When the work is completed in accordance with the Building Consent then a Code Compliance Certificate will, on application, be issued by the Local Authority.

You must carefully examine the Building Records Check and satisfy yourself that all work on the property has:

- A Building Permit for work completed prior to 1991; and/or
- A Building Consent and a Code Compliance Certificate for work completed from 1991 onwards.

(**Please note** - there was a transitional period through the years 1991 to 1994).

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If you are obtaining a Building Report we recommend you ask your Building Inspector to examine the Building Records Check for you and confirm that all work on the property has the necessary Building Permits, Building Consents and Code Compliance Certificates.

If you have any concerns at all about the Council Records we strongly recommend you personally visit the Council Information Office and see one of the Duty Officers to clarify issues of concern. **If any matter remains unresolved and of concern to you please let us know and in any event before this agreement becomes unconditional.**

**PLEASE NOTE:** We have not personally inspected the property you are buying. We are in no position to confirm whether or not the Council records are in order for the property. You must check these yourself and satisfy yourself that they are in order. We will not take responsibility for this for you. There are staff at the Council offices who can assist you if need be.

## **Building Survey/Property Inspection**

If your Agreement is subject to a Builder's Report/Building Survey/Property Inspection then if you have not already done so, please advise us of the name and contact details of your building surveyor/inspector. Please also advise us whether or not you are happy with the report and, in particular, keep us informed of progress/difficulties that arise. **We recommend that all Purchasers obtain a Builder's Report/Property Inspection/Building Survey.**

We also recommend you ask your Building Inspector/Property Inspector/Building Surveyor to examine the Building Records Check for you and confirm that all work on the property has the necessary Building Permits, Building Consents and Code Compliance Certificates.

Please note:

- The person providing the builder's report/property inspection/building survey must be qualified to give such a report (ie with known professionalism and expertise in the building industry relating to building inspections).
- **If you are able to we recommend you engage a qualified Building Surveyor who is a member of New Zealand Institute of Building Surveyors as their qualifications are industry recognised.**
- If you avoid the agreement because the builder's report/property inspection/building survey is unsatisfactory you may be required to provide a copy of a written builder's report/building survey immediately upon request by the vendor.
- The report must be given in good faith.
- It must be given in accordance with basic inspection and reporting practices and methods for building reports/building survey (and must be in writing).

It is clear from the above that a report on the back of a cigarette packet "by the buyer's friend the builder" is not acceptable.

If your Agreement is not subject to a Builder's Report/Property Inspection/Building Survey then the condition of the property is at your risk and we assume that you have satisfied yourself that either the property is in sound condition or you have priced in any repairs and maintenance required.

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Some Builder's Report/Property Inspection/Building Survey clauses are worded in such a way that if you don't give notice within the strict timeframes of the relevant clause you will lose the right to object to a Builder's Report/Property Inspection/Building Survey.

If you have any concerns in relation to the Builder's Report/Property Inspection/Building Survey please let us know and in any event before this Agreement becomes unconditional.

You may also wish to raise these issues with your Real Estate Agent, who may be able to negotiate with the vendor to have the Vendor undertake certain repairs at their expense or agree to a price reduction but while such negotiations proceed please make sure you keep an eye on timeframes and notice requirements under the Agreement so that you do not prejudice your position should the negotiations fail.

**PLEASE NOTE: We have not personally inspected the property you are buying. We are in no position to confirm whether or not the Builder's Report/Property Inspection/Building Survey you have obtained is acceptable. You must check the Builder's Report/Property Inspection/Building Survey yourself and satisfy yourself that it is in order. We will not take responsibility for this for you. If in doubt, speak to the Building Inspector/Property Inspector/Building Surveyor who prepared the report and clarify matters of concern.**

## **Engineer's Report**

In the case of commercial properties, in addition to a Builder's Report we recommend a Purchaser obtains a report from a Registered Engineer in respect of the structural integrity of the building. In the current environment of concern regarding earthquake-prone buildings and Council's minimum requirements with time limits for compliance extending to existing buildings it is desirable to obtain a report indicating the extent of compliance with National Building Standards, expressed as a percentage. If the building is at risk in an earthquake seek specific advice from the Structural Engineer as to the work and cost required to increase compliance to an acceptable level.

## **Due Diligence**

In the case of a commercial property purchase it is prudent to carry out extensive due diligence before entering into an Agreement or make the Agreement subject to due diligence being carried out. This includes but is not necessarily limited to:

- (a) The Title to the property and any encumbrances affecting the property.
- (b) The overall financial suitability and commercial viability of the Purchaser's proposed acquisition of the property.
- (c) Any outstanding requirements or requisitions relating to the property.
- (d) The zoning of the property.
- (e) The value and condition of the property, including building, engineering and structural issues.
- (f) Statutory and regulatory requirements affecting the property and current compliance with such statutory and regulatory requirements; and

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- (g) All such other matters as the Purchaser in the Purchaser's sole discretion, deems pertinent.
- (h) The ability of the Purchaser to raise sufficient finance from the Purchaser's Bank to complete settlement on terms acceptable to the Purchaser.

## **Leases**

An important, perhaps crucial aspect of most commercial property purchases is the quality of existing lease(s) of the property. Ensure you receive copies of all written lease agreements affecting the property together with the full chain of lease documents (including e.g. Deeds of Renewal of Lease, Deeds of Variation of Lease (incorporating rent reviews and other changes) and Deeds of Assignment of Lease (changes of Tenant). Conduct your own due diligence in respect of the suitability and solvency of the Tenant and Guarantor. Make enquiries as to the reliability and timeliness of the Tenant's historical rental payments. If possible meet the key person relating to the Tenant and satisfy yourself the premises suit the Tenant's current and future needs (at least for the foreseeable future). Check outgoings and the rate of recovery from Tenants of the property noting that any shortfall must be funded by the property owner.

## **Value**

Consider obtaining advice from an experienced Registered Valuer. This will help you decide what purchase price to offer for your property.

## **Chattels**

Please check the Agreement and note which chattels are included with the sale. Items that are fixtures are automatically included as they are deemed to form part of the land. If you are uncertain whether an item is a chattel or a fixture it is best that it be listed as a chattel so that it clearly passes to the purchaser on settlement. If you have not already done so we recommend that you check all chattels that have an operational function and make sure that they are in good working order. Pursuant to clause 7.3 of the Agreement the Vendor warrants that all items specified in Schedule 2 are delivered to the Purchaser in their state of repair as at the date of the agreement and all items specified in Schedule 3 are delivered to the Purchaser in reasonable working order, but in all other respects in their state of repair as at the date of the agreement. To make a claim for compensation pursuant to clause 10 of the Agreement notice of the claim must be served on the Vendor on or before the last working day prior to the settlement date (not on the settlement date).

## **Cash Out Clause**

In some Agreements there is also an "out" clause, which in certain circumstances enables the Vendor to sell the property to another Purchaser on terms and conditions acceptable to them. They must give you the specified notice in which to make the Agreement unconditional or the Agreement will be terminated.

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## **Going Unconditional**

If your Agreement is subject to conditions then it is important for you to be aware that if you want to be certain of securing this property that these conditions need to be satisfied by the due dates recorded in the Agreement (time being of the essence). If you fail to do so and either don't seek or aren't given an extension to the date for satisfaction of these conditions then the Vendor may cancel the Agreement for non-satisfaction of these conditions by due date.

Accordingly, it is important that you keep us informed of the satisfaction or otherwise of these conditions as this Agreement proceeds. We encourage you to make an appointment to see us at our office before any of the conditions are satisfied so that we can better assess your progress and be made more aware of your own personal circumstances.

The desirability of an appointment at our office before satisfying any of the conditions applies particularly to first home buyers, clients inexperienced in the property market (or who simply have not bought a property for a while) and clients for whom English is a second language.

Before you instruct us to confirm to the Vendor's lawyer that any condition is satisfied you must be absolutely sure that you are satisfied with the condition because once the condition has been confirmed you are committed. If you are in any doubt at all please advise us of the nature of the difficulty and if in doubt delay confirming the condition until the matter causing concern has been resolved.

Once all the conditions in your Agreement have been satisfied then the Agreement is unconditional. Some agreements don't have any conditions and they are unconditional at the outset. This means that as Purchaser you have a prima facie legal obligation to proceed and settle on the scheduled date for possession and settlement. Failure to settle on the due date could give rise to the vendor seeking to enforce the agreement, a damages claim and interest on late settlement.

## **Deposit**

When you sign an Agreement the agent will insert a deposit. This is generally 5% or 10% of the purchase price but sometimes it will be less than 5% depending on the amount you will need to borrow under your finance. It is important that whatever figure is inserted that it can be paid on the date it is due, which is normally the unconditional date. If the deposit is not paid the Vendor can serve notice on the Purchaser's Solicitor stating if it is not paid within three working days the contract will be cancelled. Alternatively the Vendor can simply impose the late settlement interest figure (normally about 14% per annum) and on settlement you will be required to pay that interest together with the purchase price. Based on a \$10,000.00 deposit that was not paid the interest would amount to \$116.66 per month.

## **Vendor Work**

Sometimes it is necessary for the Vendor to complete work on the property as part of the conditions of the agreement. What happens if the Vendor does not complete that work before the settlement date?

It is suggested a clause be inserted that if the Vendor does not complete the work by the settlement date or it is not completed in a proper and tradesmanlike manner that a certain amount be withheld which would allow the Purchaser to complete it with any surplus to be paid to the Vendor.

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## Caveat Emptor - Buyer Beware

There is relatively little consumer protection in New Zealand for purchasers of property. It is your responsibility to check any Agreement before you sign it and to carry out your own thorough due diligence in respect of any transaction and in respect of the property itself.

## Risk Management

The purchase of a commercial property is one of the largest financial commitments you will make. Once you have committed yourself to a bank loan, your lender will expect you to meet your repayments without fail. No one likes to think about serious illness or death, but it makes sense to reduce the financial impact of such possibilities.

We therefore encourage you to seek sound risk management advice from an Authorised Financial Advisor (AFA) with a Qualifying Financial Entity (QFE) as a matter of urgency.

## Type of Ownership

You need to decide the identity of the party to be registered as the owner of the property. Put simply your choices, depending on your circumstances, are:

- (a) Sole Tenant:** This is suitable if only one person is to purchase the property.
- (b) Joint Tenants:** This can apply if more than one person (eg a couple but also other family members or business associates) are to purchase the property. The effect of joint tenants is that on the death of one of the co-owners the interest in the property of the dead person passes automatically to the survivor by virtue of the Law of Survivorship, rather than pursuant to the provisions of the dead person's Will (if any) or in the absence of a Will pursuant to the Intestacy provisions of relevant legislation.
- (c) Tenants in Common:** This can apply if more than one person (eg a couple, but also other family members or business associates) are to purchase the property.

One of the effects of tenants in common is that the Law of Survivorship mentioned above does not apply. This means that on the death of one co-owner the interest of the dead person passes according to the dead person's Will (if any) or in the absence of a Will pursuant to the Intestacy provisions of relevant legislation.

Another effect of tenants in common ownership is that the parties can decide in what proportion each co-owner will hold his/her/its interest in the property, whether that be equal or unequal shares.

- (d) Default Election:** If more than one individual is buying the property as co-owners then you need to be proactive in advising us whether or not you wish to purchase the property as joint tenants or as tenants in common and if the latter then you also need to advise us in what shares, whether equal or unequal. We would be pleased to speak to you about this further when you are in our offices or by telephone. If we don't receive specific instructions from you to the contrary we will be registering the property in your names as co-owners as joint tenants which is the LINZ e-dealing default option in the absence of an alternative choice being made.



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**(e) Trusts:** Some clients have a Trust that they wish to utilise to purchase the property or may wish to establish a new Trust and nominate the Trust as purchaser of the property. If this is the case please make an appointment to see us to discuss this as soon as possible.

**(f) Company:** If the property is being purchased as an investment property then you should give consideration as to whether or not to purchase the property through a company at the outset, which is generally considered desirable. We can arrange for such a company to be incorporated and again, if this is the case, please let us know as soon as possible. However, if you wish to make an application to Inland Revenue to have the company registered with particular tax status (eg "a look-through Company"), then you will need to ask your accountant to attend to this for you.

Finally, it is important that you let your Lender know as soon as possible the ownership arrangements you intend for the property. Failure to do so could cause delays and difficulties with settlement.

## **Settlement Process**

If this Agreement is or becomes unconditional then prior to settlement and possession you will need to attend to the following matters:

**(a) Signing:** Prior to settlement you will need an appointment to attend our office to sign conveyancing papers. If you are raising a mortgage on your property, this will include lender's documentation and securities. Please note the identification requirements mentioned above.

This appointment will be made in due course (following receipt of lender's mortgage instructions, if applicable). If it is impractical for you to attend at our offices please let us know as soon as possible and if there is sufficient time we may be able to make arrangements to post these to you for signing and return prior to settlement.

**(b) Building:** As a matter of policy you should have Full Insurance risk over the dwelling and over the building and any other improvements on the property. Certain properties can't be insured, for e.g. those with a history of flooding, boarding houses and very old buildings. We suggest that you arrange insurance cover as soon as possible, with the cover to take effect on the date of settlement. If you are in any doubt about your ability to arrange full insurance acceptable to you and to your lender for a particular property you must check that it is insurable before the Agreement becomes unconditional. The policy must be in the names of the registered proprietors i.e. yourselves, company name, or the name of your trust and your Bank (if you are obtaining a mortgage) must be noted as first Mortgagee. Once you have arranged the insurance, please ask your insurer to email us a certificate of currency to our office, for our attention. Please note that we can't draw down your lender's finance without a copy of this insurance certificate so please ensure that you attend to this as soon as possible and follow up as necessary to avoid any difficulties on settlement.

The Agreement provides that you are able to inspect the property prior to settlement. You can do this up to the day before settlement (but not on the day of settlement) and can contact the real estate agent to make a time to do this. When you inspect you are checking to see that the property and chattels are in the same condition they were in the day you signed the Agreement to purchase the property.

**(c) Possession:** It is normal for you to take possession of the property after all funds have been paid to the Vendor's Solicitor in exchange for Title to the property.

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**(d) Payment of balance of purchase price:** Prior to settlement we will contact you advising of the balance that we will require from you to complete settlement. This balance will include the rates apportionment we mentioned above and our costs and disbursements and it will need to be paid to our trust account by way of cleared funds, on or before the date of settlement, prior to us completing the purchase for you.

We prefer to receive payment of the balance of the purchase price from you by direct credit to our Trust Account.

However, you will need to attend to this direct credit at least 3 full clear working days before settlement date to allow the funds to clear. Please include in the narration of any electronic funds transfer your name and client number (noted above) for accurate and prompt receipting. Please note that generally we will not be putting these funds on interest-bearing deposit as the amount of net interest that will be generated does not justify the administrative time involved.

If the amount is large and you are unable or choose not to complete the direct credit yourself you can arrange for your bank to electronically transfer these funds to our trust account and please ask them to email us their undertaking that they have attended to this, that the funds are cleared and will not be reversed, in which case the 3 day rule need not apply.

If there are surplus funds available to you on the settlement date, you will need to provide us with an original deposit slip for the account into which you wish the balance of funds to go. This will enable us to deposit cleared funds to that account, through our online banking system. If we do not hold your original deposit slip we will be unable to provide this service to you and the funds will be banked manually to your account, thus taking the time to clear.

**(e) Rates:** These are apportioned as at the day of settlement, with the Vendor being liable for the period of the rating year up to that date and you being liable for the balance of the rating year. The apportionment will be set out in our final statement of account. For most transactions there is a rates adjustment payable by the Purchaser on settlement so please budget for this. We will advise the amount in due course.

**(f) Rent:** If the Commercial Property you are buying is leased rent will be apportioned as at the day of settlement, with the Vendor entitled to rent for the rent up to and including the day of settlement and the Purchaser thereafter. The apportionment will be set out in our final statement of account.

**(g) Notification of Change of Ownership:** In addition to registering the property in your name, we will prepare Notices which are sent to the local and regional Council by the Vendor's solicitor, so that your name will be included in their records as the new owner of the property. Once these Notices have been processed by Council (allow 2-3 weeks) we recommend you consider completing a direct debit authority for local authority rates to avoid inadvertent late payment with the consequential penalties.

**(h) Warrant of Fitness:** Check whether there is a current warrant of fitness for the Building on the Settlement Date.

**(i) Leases:** Ensure you receive the full chain of lease documents for the Property on Settlement.

**(j) What time will settlement be completed?** We are often asked this question and it is

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hard to answer. The best we can say is that the Vendor and Purchaser must be ready to settle by no later than 4:00 pm on the date of settlement and possession or they are in default with consequences. In reality, settlement is usually completed much earlier in the day with most settlements being completed between 11:00 am and 2:00 pm.

## **Bright-line Test AND RLWT**

The *bright-line* test is a form of Capital Gains Tax applying to sales of all residential land. It applies to sales of residential land acquired between acquired after 28 March 2018 and sold within 5 years of acquisition (“*the five year bright-line test*”) and to land acquired after 26 March 2021 and sold within 10 years of acquisition (“*the ten year bright-line test*”). There are some exemptions for the “main home” but not for investment properties. Also, new builds are subject to the “*five year bright-line test*” only.

Residential Land Withholding Tax (RLWT) applies if the Vendor is an offshore person for the purposes of the “*bright-line*” legislation. If the Vendor and Purchaser are “*associated*” for tax purposes then the obligation to calculate, deduct, and pay RLWT to Inland Revenue is transferred to the Purchaser and the Purchaser’s conveyancer. Please urgently advise if the *bright-line* test applies, you believe the Vendor is an Offshore RLWT person and you and the Vendor are associated.

## **Land Transfer Tax Statement**

Before settlement you will be required to complete a Land Transfer Tax Statement.

In the case of individuals, we will require your IRD number(s).

If the purchasing entity is a Trust or a company, we will require the IRD number of that entity.

## **Conflicts of Interest**

On occasion we find that the same practitioner from this firm may be asked to act for both the Vendor and the Purchaser or that one practitioner from the firm may be asked to act for the Vendor and another practitioner may be asked to act for the Purchaser.

This situation is not uncommon in a small provincial city like Palmerston North.

If this is the case on this occasion we are proceeding to act for Vendor and Purchaser on the basis of your informed consent. In the event any conflict of interest emerges during the course of this transaction such as a dispute between Vendor and Purchaser then we will recommend in these circumstances that both Vendor and Purchaser seek independent legal advice as soon as practicable. If we are incorrect and you do not so consent to these arrangements please urgently let us know so that alternative arrangements can be made for you to receive independent legal advice with another practitioner from outside our firm in respect of this transaction immediately.

If there are any matters about which you are uncertain please do not hesitate to contact us.