

Hard Case ▶ Janice Hughes

Market undulations

So, the housing market's really, really, truly bottomed out now. Oops, no, hold yer horses, it's ... it's ... rallying! Ohhhh, wait a tick, on second thoughts, cancel that headline. Apparently – gasp – we haven't seen anything yet. Real domestic dwelling doom is just round the corner.

Phew. Staying across the up with the up, down, round-about of real estate commentary feels a bit like riding a roller-coaster ride straight after Christmas dinner. But, in recent breaking news, arguably one of the most wide-ranging changes affecting property law in the past two decades has landed.

Janice's Lesson Number 1: In short, it poses quite a different take on how we Kiwis trade property and, anyone who's buying and selling a house from hereonin, cannot – and should not – rely on previous experiences or knowledge to see them through.

Let me lay the foundations with a bit of a history lesson. If you've bought or sold property in the past 20-odd years, you've likely sealed the deal with a standard sale and purchase agreement form, which, until now has been a joint initiative between the New Zealand Real Estate Institute and the Auckland District Law Society. Real estate agents throughout the country have bought the rights to use, what has been, the only standard form available.

But when it came time to, once again, update this all-important document, the ADLS and REINZ had differing philosophies on the best way forward. The ADLS believed the existing standard sale and purchase agreement needed only its usual tickle up, while the Institute felt it was high time for a major makeover, including significant changes to the spirit, wording, conditions – and, even the look and layout – of this crucial contract.

And then there were two

The upshot is, for the first time, there are two sale and purchase agreement forms in circulation. Agents can now opt for the ADLS's updated version of the long-standing form or the REINZ's totally new-look, “plain English” contract.

Janice's Lesson Number 2: The real potential curve ball here, though, is not just the competing contracts, but that they are really quite, quite different in both content and structure. What's more, the Real Estate Institute's offering is, in many ways, a wholesale departure from what buyers and sellers are used to.

As with any new contract, the proof of its success will be when it's inevitably tested. However, it doesn't take a Supreme Court judgment to realise the new-look document moves away from the “buyer beware” emphasis, evening the playing field to include a weighty measure of vendor-be-just-as-aware-or-else-you're-leaving-yourself-wide-wide-open.

Vendors are traditionally rather notorious for getting way down the negotiation path before taking legal advice. While that's never been ideal and plenty have been burned, with this new sale and purchase agreement, it would be nothing short of lunacy to enter into selling your house without first checking the lay of the land with your legal adviser.

Just how different can it be, you ask? Here's an indicative – not exhaustive, mind – rundown of a mere few of the differences that carry with them some rather unpleasant ramifications for the ill-informed.

Unsettling settlement

Janice's Lesson Number 3: Let's start with a basic one. Settlement date's settlement date – right?

Ah, not necessarily. Under the REINZ-designed agreement, there is scope for the previously set-in-stone settlement to be delayed if certain things don't go as they should. Not a big deal for some, but possibly catastrophic for vendors banking on the money to be instantly available on a certain date to purchase a property they're committed to.

Onto the structural integrity of the home – a hairy one at the best of times – but this new form requires some heavy-duty “promises”, formerly “warranties”, from the vendor.

While the ADLS's agreement sticks with the obligation for the vendor to ensure full code compliance for work they've done, the Real Estate Institute's form takes that way further to include a “promise” that all other rules – pretty broad, I know! – have been adhered to. The anticipation is this is alluding particularly to the Building Act, which means the liability for problems doesn't fall solely with the council that signed off the work; the vendor stands right there in the firing line, too.

Another change that I'm particularly fascinated to see evolve is around the obligation to provide the buyer full details of any “unfavourable agreement” between the seller and any other person. Once again, that's broad – and, likely, subjective, too.

Promises, promises

I'll give you a simple example. Last year, your neighbour sought your permission to plant a large cherry tree. Sure, you told him, no worries at all. But, the neighbour couldn't source the right tree at that time. You sell your property, and your erstwhile neighbour finally plants the tree. The new owner hates it. Under the new standard agreement, she could have a case to come after you on a range



of grounds, including “unfavourably affecting the buyer's future use of the property”. Granted, a cherry tree might not be the end of the world, but think deck, fence, height restrictions, easements, etc, and, well, you see the potential for problems to chase you well after the sale.

Janice's Lesson Number 4: Many of these new and, in some case, onerous, promises required of the vendor aren't on the actual contract form you sign, but will come in a separate booklet – READ IT AND ENSURE YOU UNDERSTAND IT. Not only will you be signing your name to the sale and purchase agreement document, your moniker will also denote you agree to everything contained in the appended booklet. And, remember, many of those clauses are completely new, and might just come as a shock for the uninitiated.

Janice Hughes is AWS Legal's resident partner in Wanaka. Please remember that this information is designed as a general guide and should not replace specific legal advice on a particular issue.