Property Speaking

22 Oxford Street, Richmond
Level 1/54 Montgomery Square, Nelson
PO Box 3300, Richmond 7050
T 03 543 8600

23 Wallace Street, PO Box 182, Motueka 7143
T 03 528 0005

enquiry@atkinsoncrehan.co.nz
www.atkinsoncrehan.co.nz

Atkinson | Crehan Law

ISSUE **44** | Spring **2023**

Welcome to the Spring edition of *Property Speaking*, the last issue for the year.

We hope you enjoy reading this e-newsletter and that you find the articles to be both interesting and useful.

To talk further about any of these articles, or indeed any property law matter, please don't hesitate to contact us – our details are on the top right of this page.

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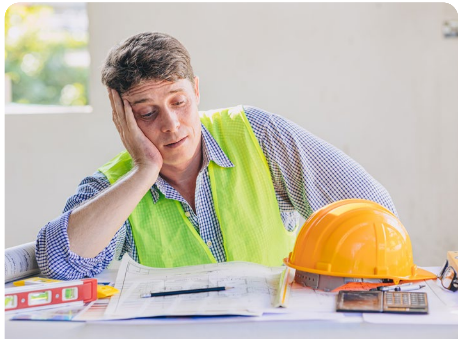

What happens if your builder goes bust?

Choose carefully

Building a new home is an exciting process. It can, however, be quite daunting with risks of unexpected delays, cost increases and, in the worst scenario, your project going completely off the rails.

In this article, we discuss how choosing your builder carefully can help to give you some peace of mind as you embark on your build.

Guarantees offer the best protection in the event that your builder gets into financial difficulty, goes into liquidation and/or is unable to complete your build.

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Auction and tender overview

We are starting to see more upward movement in the property market which is positive news for property sellers.

A more buoyant market means that sellers and their real estate agents will be looking to offer alternatives to advertised price, deadline sale or by negotiation methods.

We give an overview on how the closed tender and auction processes works.

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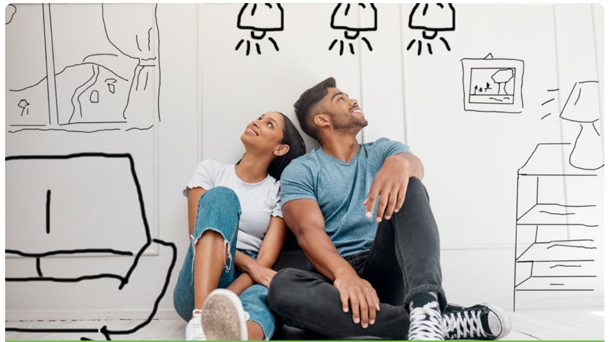

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First Home Partner scheme: on pause

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Council delays for property developers

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Short-term accommodation – take care

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Election impact on property issues

The final makeup of the post-election government may affect many property matters.

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A careful choice of builder, checking references and talking with previous customers can help give you peace of mind when starting a build. Asking us to review the contract with your builder before signing will also help.

Guarantees offer the best protection if your builder gets into financial difficulty, goes into liquidation and/or is unable to complete your project. Guarantees vary and how they apply to your build is determined by the type of guarantee that is included in your contract.

Building franchise guarantees

Nationwide builders who operate under a franchise agreement usually have a guarantee from the franchisor who will ensure that your build is completed if the local franchisee fails financially. Franchise builders value maintaining their reputation on a national level and often have significant funds to pull from other areas of their national business to ensure a customer gets their build completed. These types of guarantees provide a high level of confidence in the builders that include them in their contract and allow customers to engage with their builder with confidence.

Association guarantees

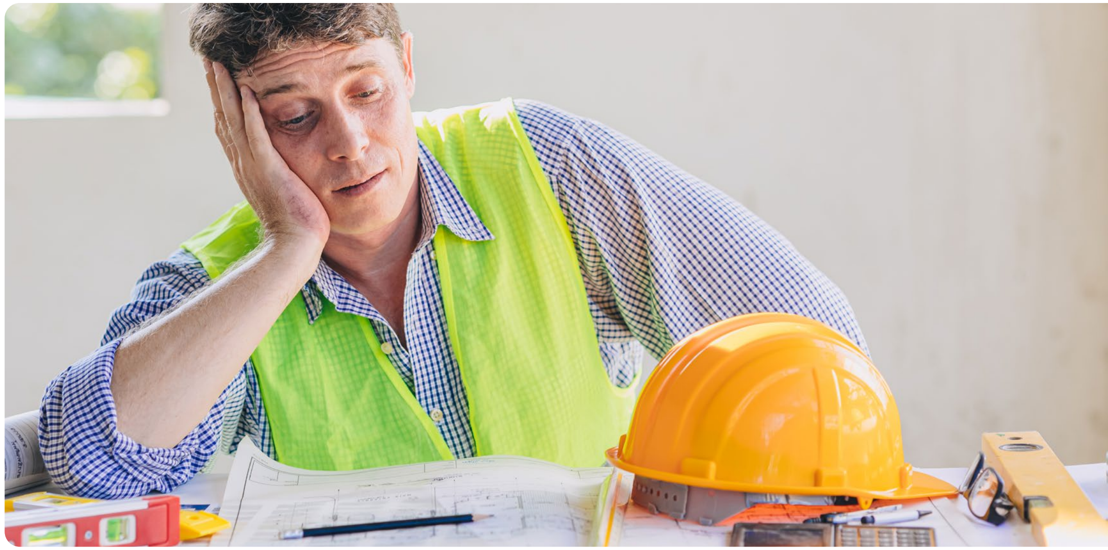
Master Build Guarantees have the Registered Master Builders Association guarantee that provides comprehensive cover for their members' work, along with cover for 10 years if your builder goes into liquidation. An important aspect is that the guarantee is only valid if you have received written confirmation from Master Build Services.

Master Builders advertise that they are Registered Master Builders but if you are not sure, simply ask them or contact the association. You will often find that franchise builders are also Registered Master Builders, so if your franchise builder cannot complete your home, you can elect whose guarantee you want to rely on. You can find more information about the operation of the Master Build Guarantee **here**.

Similarly, the New Zealand Certified Builders Association (NZCB) offers a 10-year residential build guarantee (a Halo Guarantee) if your builder is a NZCB member.

You should note that NZCB guarantees only apply after the completion of your build; they will not be helpful if your builder goes into liquidation or stops working as a builder before your build is complete. However, if your builder stops working as a builder after your project is completed, the Halo Guarantee will cover claims you would have ordinarily made with your builder under any defects liability period or up to 10 years after the completion of your build.

While these types of guarantees are the best form of protection for customers they often come with a restriction or limit on the claimable amount. These subtleties highlight the importance of getting advice on both the guarantee and the build contract before your build begins.



Other situations

When your builder's business fails and they are not a Registered Master Builder, or you are unable to rely on a guarantee from their national franchisor, there is no certainty your build will be completed. In this instance, before you engage a builder who cannot offer you guarantees, you should review the contract even more carefully.

If the builder goes into liquidation, you can engage a new builder to finish your home. There may be difficulties, however, if the progress payments are weighted in favour of the builder and the money you have paid does not accurately reflect the progress of your build. You could end up paying more than you budgeted to have the job complete with little ability to recover your losses from the builder in liquidation. If you end up in this position, consult with us immediately to navigate the cancellation of your contract and how best you can move forward.

Get advice before you start

In an industry feeling the lingering economic effects of Covid and operating in what now is a cost-of-living crisis, make sure you get the best advice and have the best protection in place before you before you sign a contract and begin your build.

Be sure to speak with us if you are thinking of building or have any concerns with your current building contract. +

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Alternative methods to sell your property

Auction and tender guide for sellers

We are starting to see more upward movement in the property market which is positive news for property sellers.

A more buoyant market means that sellers and their real estate agents will be looking at alternative ways to secure a buyer. Rather than sticking to traditional sales methods – advertised price, deadline sale or by negotiation – sellers may want to consider a closed tender or auction process.

Closed tender

The closed tender process is similar to a deadline sale. Your real estate agent will prepare the tender document for prospective buyers. Buyers must submit their offer by the date and time you specify. Under a closed tender, neither you nor the agent can look at any of the tender offers before the closing date.

You can place conditions in the tender document before it is provided to prospective buyers, for example making the agreement conditional on you purchasing another property. Tenders may also contain buyer conditions. The top offer isn't always the driving factor. For example, you may get a 'cleaner' offer (with no or few conditions) but at a lower price. Typically, you will have a short period of time after the closing date to consider all of the tenders received and decide which you want to accept.

A tender process gives a sense of urgency with a fixed date and, in contrast with auctions, buyers and sellers have more flexibility, for example, by adding conditions. It is, however, less transparent than an auction as prospective buyers have no idea of what price other bidders are offering.

Auction

A property auction is, of course, quite different from a tender process. Once a prospective buyer is interested in bidding for the property, the real estate agent will hand over all of the information on the property, and the buyer must complete any due diligence they may have on the possible purchase before the auction date.

On auction day, prospective buyers bid until there is a last-bidder-standing and the auction price has reached or passed the reserve (the minimum offer you will accept). If you have a successful buyer at the auction, then you have an unconditional agreement for the sale of your property.

It is important to note that if you want to bid on your own property at the auction (known as a 'vendor's bid') there are strict rules around this, so talk to the auctioneer before the auction.

For first home buyers, it can be challenging to buy a property at auction because they will generally have lower equity and need to provide more information to a lender and may, for example, need a building report or valuation. They may also need to pay the deposit from their KiwiSaver funds.

Similarities between methods of sale

Whatever the method you choose to sell your property, there are some standard provisions in the Agreement for Sale and Purchase that a potential buyer will expect to see.

Unless the property is tenanted, the buyer is entitled to undertake a pre-settlement inspection prior to settlement and, if the property isn't in the same condition as when the agreement or tender was signed, or when the auction is held, then the buyer can ask you to remedy any issues.

The standard vendor warranties are undertakings that you provide to the buyer about various things. These include:

+ Whether you are aware of any potential claims relating to the property, such as breaching a resource consent, not complying with your obligations as a landlord, or disputes about shared driveways or boundary fences
+ Whether you have provided your neighbours with consents for them to subdivide or build on their property. This will be of particular interest to a buyer if it is going to impact on the character of the home
+ Checking whether the chattels included in the sale are all in working condition. During the pre-settlement inspection, a buyer may identify a problem chattel. If, however, this isn't picked up at the pre-settlement inspection, a buyer could seek to enforce the warranty after settlement, and
+ Confirmation that any work you have completed to the property that required a building consent or a resource consent has the appropriate consent and code of compliance certificates.

You can, and should, remove some or all of these warranties if appropriate. This can, however, be a flag for buyers to ask further questions. If you know of any issues with the home or a particular chattel, it is important to disclose these early to avoid having to compensate the buyer under any of these warranties.

Downsides

If your property does not sell at auction, you will still incur costs for the auction. You may also incur costs from your real estate agent or lawyer depending on the listing arrangements and amount of work involved.

Although there are positive signs the property market is recovering, it is still a tough market. If you are considering selling your property, it could be worthwhile exploring all selling options to market and sell your property. +

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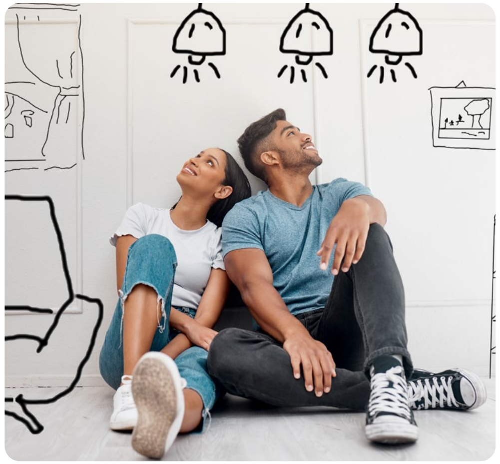

First Home Partner scheme: on pause

The coverage of the **First Home Partner scheme** has been extended, but its availability is currently on pause.

The scheme appears to be a victim of its own success. In late September, Kāinga Ora announced that it is no longer accepting applications as the scheme is now full.

As part of **government assistance** for first home buyers, the First Home Partner scheme was established to bridge the gap if you are struggling to save a full deposit. As long as you meet eligibility criteria, including being financially able to make the mortgage repayments, Kāinga Ora can pay additional deposit funds up to the lesser of 25% of your home's equity or $200,000.

In return, Kāinga Ora becomes a co-owner until you repay its contribution.

Since August, the scheme has covered purchases of existing homes instead of being limited to new builds. The eligibility criteria were also extended to allow households with a total income up to $150,000 to apply (the previous limit was $130,000) and joint purchases by whānau groups of up to six people who normally live together.

The scheme may reopen in time as Kāinga Ora works through existing applications; we recommend you ask us or Kāinga Ora about the scheme's availability if you are interested in applying.

Council delays for property developers

Subdividing off the back section or otherwise developing your property may seem like a way to 'get rich quick'; but be prepared for a long process.

Resource and building consents have never been an overnight job. The last few years particularly have seen developers face significant delays for reasons varying from staffing shortages to larger numbers of consent applications. In some areas, councils have struggled to meet mandatory timeframes for processing applications, with some taking many months longer than expected. The extent of ongoing delays differs from council to council, depending on current resources and the number of other developments underway in the area.

Regardless of your local situation, preparation remains key. A detailed application can help avoid additional information requests from the council that may cause delays. If you are undertaking any land development, do talk with us about the process involved and, particularly, the current timeframes so you can get a clearer measure on how your proposed development might progress.

Short-term accommodation – take care

As the summer holidays approach, the lure of offering a spare bedroom or sleepout on websites such as Airbnb or Bookabach to earn extra money is tempting. You should take care, however, to ensure you are aware of the rules around offering short-term accommodation.

Some of the constraints include:

+ **Resource consent**: The extent of council restrictions will depend on the rules applying where your property is located. Some councils require a resource consent where your property is let out for more than a certain number of days or for a certan number of guests per year.
+ **Other restrictions**: Properties with a body corporate, title covenants or a mortgage all may be subject to restrictions around letting the property for short-term accommodation. Likewise, if you are a tenant, both commercial and residential tenancies are usually subject to limits on how the property can be used or sublet.
+ **Tax**: Depending on your situation you may need to pay both income tax and GST on the revenue. Further information can be found **here**.
+ **Insurance policy limits**: Check with your insurer that your policy will cover you letting the property.

In addition, you should ensure the booking site's terms and conditions suit your individual circumstances; their T's and C's are not all the same. You should also check they include all obligations you might expect of a guest as they will form the main part of your agreement with these visitors.

To help avoid penalties or other legal disputes, we strongly recommend that you consider these points well before listing your property. If necessary, talk with us and your accountant to ensure you are not inadvertently breaking the law and to ensure your guests have a good experience.

Election impact on property issues

The election's outcome is set to determine the future of many property issues, such as the fate of the recently passed Natural and Built Environment Act 2023 and the Spatial Planning Act 2023 as well as policy around foreign buyers, property tax rules and public housing.

At the time of writing, the election results have yet to be formally confirmed, but we will keep track of any developments and provide a fuller update in later editions. In the meantime, if you have any questions regarding the effect of government policy on your property plans, please do contact us. +

The next edition of *Property Speaking* will be published in **early Autumn 2024**.

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