

TURNER HOPKINS

BARRISTERS & SOLICITORS

SUMMER 09

NEWSLETTER

KEEPING YOU INFORMED

CONTENTS

- CONTRIBUTORY MORTGAGES
- UP TO SPEED WITH DRIVING LAWS
- NEW APPOINTMENT
- NEW AGREEMENT FOR SALE & PURCHASE
- SPOTLIGHT ON PRIVACY ISSUES

CONTRIBUTORY MORTGAGES

What is a Contributory Mortgage?

A contributory mortgage is where two or more contributors pool financial resources for the purpose of advancing a loan to a borrower which is secured by a registered mortgage over land together with supporting guarantees and such other collateral securities and charges as may be appropriate. These advances are managed by a company on behalf of the contributors. The management company operates a trust account on behalf of the contributors to which their funds are deposited upon receipt for investment, and on repayment pending either being re-advanced to a new borrower or repaid to the contributor.

What are the advantages of a Contributory Mortgage?

There are a number of reasons why a contributory mortgage offers contributors a secure investment which still generates a very fair return for the contributor in today's economic climate.

One of the fundamentals of investment is the spreading of risk. If investing in the share market, it is considered appropriate and prudent to spread investments over a number of companies rather than one or two. Similarly, managed funds will normally manage this risk by investing in shares, bonds and fixed interest securities. A prudent investor may further spread their investment in a number of funds themselves.

The same philosophy lies behind a contributory mortgage in that:

- Investors are able to spread their risk by investing a total of, say \$100,000, and having this investment broken up into lots of \$10,000, which are invested into separate mortgages;
- The investor contributes to a loan that is secured over specific property rather than forming part of a bulk fund that could be secured over a large number of properties that can change over time without the contributors' knowledge or consent. A contributor who invests in a contributory mortgage can retain a significant degree of control by vetting and approving each investment proposed to them.
- The contributor's consent is required to the investment and before such consent is provided, a valuation report prepared by an independent registered valuer is provided to the contributor for their perusal and approval.

What types of property are accepted as security for Contributory Mortgage loans?

Loans are offered to parties which are able to provide security in the form of residential property. The security will always comprise a first mortgage at no more than:

- 70% of the property's value in the case of a specific authority;
- 66.6% of the property's value in the case of a general authority; or
- 50% of the property's value in the case of vacant land.

All values are established by a registered New Zealand valuer. Lending will not be made in relation to development projects which have caused so much distress in the finance company industry recently.





What is the return a Contributor receives?

One of the main advantages of a contributory mortgage is it develops a very close relationship between the borrower and the lender. This enables each party to avoid the significant costs of a bank or finance company intermediary.

The interest rates offered to contributors are normally significantly above those offered by trading banks and similar institutions. The current rate received by contributors is 8.5% per annum net of all fees and other charges. This is normally paid monthly by the borrower to the management company and then direct credited to the contributor's nominated account.

What information is provided to a Contributor prior to investment?

The decision to invest is made following receipt of an application by a borrower together with a comprehensive package of supporting information that will identify the value of the property being offered as security; the ability of the borrower to meet the repayment obligations under the loan and a credit report of the borrower. The package will include a registered valuation, bank statements, credit report, statement of assets and liabilities, statement of income and expenditure etc.

The decision to recommend the proposal to the contributors is made by a security panel knowledgeable in best practice banking and security assessment. Only when it has passed this initial screening process will an application be forwarded to contributors for their consent. The contributor must receive a copy of the valuation

of the property and a brief outline of the proposed investment before they are able to give their consent, unless they choose to provide a general authority which allows investments on their behalf within the agreed parameters without seeking the contributor's consent on each occasion.

We believe contributory mortgage investments are an investment that warrants inclusion in an investment portfolio for individuals seeking a sound return on capital which also provides an opportunity to spread investment risk while still being actively involved in the decision making process relating to their funds.

Turner Hopkins have a Contributory Mortgage Company which has been established to take advantage of the benefits available under a contributory mortgage investment. Please contact Mike Newdick or Rachael Jhinku for further information.

MAKE SURE YOU ARE UP TO SPEED WITH THE LAW BEFORE YOU DRIVE THIS SUMMER

This summer it will be an offence to drive and use your hand held mobile phone and to drive or attempt to drive a motor vehicle when a person is impaired and their blood contains evidence of the use of a controlled drug or any prescription medicine.

Don't hand hold your mobile phone and drive

As at 1 November 2009 it is now only legal to use a mobile phone to make, receive or end a call when driving if:

- the driver does not have to hold or manipulate the phone to do so (i.e. the mobile phone is completely voice activated); or
- the mobile phone is securely mounted to the vehicle and the driver manipulates the mobile phone infrequently and briefly.

Drivers are not allowed to create, send, or read text messages while driving under any circumstances. However, a driver may use a hand held mobile phone if the driver is using the phone to make a 111 or *555 call and it is unsafe or impracticable for the driver to stop and park the vehicle to make the call. It is not Parliament's intent to make it illegal for motorists to use SatNav or music functions on their mobile phones, provided these are mounted in the vehicle and are manipulated infrequently and briefly.

An infringement fee of \$80 and 20 demerit points is the penalty for those breaching the ban on using hand held mobile phones while driving.

Don't drug and drive

From 1 December 2009 a police officer will have the ability to require a person to undergo a compulsory impairment test if they have good cause to suspect a person has consumed either prescribed medication or illegal drugs. An individual can be required by a police officer to undergo an impairment test if they are:

- a person whom a police officer has good cause to suspect has recently driven or attempted to drive a motor vehicle under the influence of drugs; or
- the driver of a vehicle that has been involved in an accident, or if they are unable to locate the driver, then a person whom the police officer has good cause to suspect was in the vehicle at the time of the accident.

Proposed impairment tests include balance (the one-leg stand test), co-ordination (the walk and turn test), and the eye-pupil response test. If a person fails the impairment test then a blood test will follow to establish whether the person has taken a controlled drug or any prescribed medication.

It is not an offence if the person consuming the controlled drug or prescription medicine has done

so in accordance with:

- a current and valid prescription; and
- any instructions from a health practitioner or the manufacturer of the drug or medicine.

It is also not an offence if the person has been administered the drug or medicine by a health practitioner without a prescription and they have complied with any instructions the health practitioner has given them.

The penalties for drug-impaired driving are similar to the current penalties for driving under the influence of alcohol; six months disqualification of licence and a fine of up to \$4,500.

Conclusion

If you want to stay connected to the mobile phone network while driving then it is imperative you get a hands free car kit or pull over safely and legally to make or take a call. Alternatively, simply turn your mobile phone off while driving. If you are taking prescription medicine and you intend to drive, ensure you take the medicine in accordance with your health practitioners' and/or the manufacturers' instructions.

Please contact Douglas Mitchell or any other member of the traffic and transport team we have at Turner Hopkins as they are more than willing to answer any queries you may have regarding these matters or any other area concerning the use of our roads.



SLOW DOWN - CAUTION REQUIRED

An alternative form of agreement for sale and purchase is now available. We recommend you continue to use the existing form of agreement.

There is a potential hazard on the road to completing your sale or purchase free of disputes and hassles.



The existing form of agreement for the sale and purchase of property (the NZLS/REINZ agreement) has been used in New Zealand for over twenty years. It is tried and tested and has the benefit of years of settled case law and academic commentary.

We can usually expect that the vast majority of sales and purchases which use the existing agreement will proceed to completion smoothly and without any unexpected disputes.

However, all this could be about to change with the introduction of an alternative form of agreement being promoted by the Real Estate Institute of New Zealand. We believe that the new agreement could be a major roadblock on the road to smoothly completing your property transaction.

The new agreement is being promoted by the Real Estate Institute as a new plain English agreement which will be more easily understood by the ordinary person in the street. However, property solicitors in general are very concerned by the potential problems which could arise from use of the new form of agreement. The new agreement introduces new concepts and new terminology. This will lead to confusion and uncertainty. Although the language used is "plain English", the legal effect of the phrases and words used is unknown. This means that there is potential for dispute between a vendor and purchaser on virtually every aspect of the transaction. There are also new unexpected time frames for settling various condition dates and issuing various notices which will catch out the unwary.

We think that the new form of agreement is particularly unfavourable to vendors. For example, the agreement gives the purchaser's solicitor the ability to withhold consent to the title for anything that "could" be registered on the title, that "might" affect a purchaser's future use of the property. This is giving a purchaser much more scope to object to the title than is presently allowed under the existing agreement. Another example is that the agreement requires the vendor to advise the purchaser of any notice given that "affects or might affect the buyer's future use or benefit of the property." This rings alarm bells for us - a clause like this raises very speculative issues over the question of what "affects or might affect" the property. The use of subjective terms is a big problem and we think that clauses like this in the new form of agreement are simply opening the floodgates to many potential disputes.

We understand that the new form of agreement for sale and purchase is now available to Real Estate Agents, but we have not seen any agreements on the new form as of yet. We think this might be because of the general concern in the legal and property community about the problems with the new agreement and the vast potential for dispute. We recommend that if you are contemplating selling or purchasing property through a Real Estate Agent that you check to ensure that it is the existing ADLS/REINZ agreement for sale and purchase form which is being used. If you have any doubts, please talk to us before you sign the Agreement. We recommend that you do not volunteer to be a guinea pig for the Real Estate Agents Institute to test out how well their new agreement works!

Please contact Rachael Jhinku or anyone from our Property Team if you would like further advice on your property transaction.



We are very pleased to announce that Lianne Jamieson has been appointed a Senior Associate of the firm.

Lianne is a Registered Legal Executive and has had a long association with Turner Hopkins, having joined the firm in April 1994.

She is also a Fellow of the New Zealand Institute of Legal Executives Incorporated.

Lianne has extensive conveyancing expertise with a particular interest in residential transactions and residential and commercial land subdivisions (including crossleasing and unit titling).

She has developed considerable experience and specialises in advising and providing banking and finance clients with security for their advances and enforcement of those securities where necessary.

Lianne has built up strong relationships with her long-term clients and is committed to providing prompt, effective and friendly services to her clients.

"I enjoy working to assist our clients and strive to provide practical solutions and a thorough and efficient result".

Lianne can be contacted by phone on 486-2169 or by email: lianne@turnerhopkins.co.nz

SPOTLIGHT ON PRIVACY

Most of us value the advances in technology that enable us to obtain information on just about anything with a click of a mouse. We can stay in contact with family and friends the world over through email, chat rooms and social networking websites such as Facebook and Bebo. We shop and pay our bills online, check ski conditions on Mount Ruapehu or the surf at Mount Maunganui all from our computers.

What most of us do not realise is that every time we use our credit card, surf the net or download photos we are creating a digital footprint. Alarming, a recent study by International Data Corporation (IDC) has revealed that the digital information generated about us on a daily basis (dubbed our "digital shadow"), is now greater than the total information that we actively create ourselves and it is going to continue to increase at a rapid rate.

A great deal of information about us is gathered through surveillance footage without us even realising it. Every time you walk into a department store, bank, petrol station or supermarket you are more than likely being filmed through closed circuit television (CCTV). CCTV is also used on many central city streets; Auckland's Queen Street alone has over 100 cameras operating, not to mention the cameras monitoring Auckland's motorways.

The Privacy Act 1993 requires that a person should be made aware that information is being gathered about them and the purpose for doing so. A Hamilton City nightclub came under scrutiny last year when the use of CCTV footage revealed a patron causing damage. The cameras were located in the nightclub toilets and the patron was not aware he was being filmed as there was no signage indicating that cameras were in use.

The release of the New Zealand edition of Google Street View has also been controversial. It is created from millions of photos taken from cars equipped with cameras that travelled the country taking images of our streets. The result is that anyone with access to the internet can take a virtual walk down your street and view the surroundings. Concerns raised about identification of people and vehicles have been addressed by the blurring of faces and licence plates. There is also a facility to report a concern about a particular image. This may be of small comfort as by the time the image is discovered, the damage could have already been done.

Privacy Commissioner Marie Shroff has identified privacy and data protection as being one of the biggest issues of our time, and warned that the misuse of personal information, identity theft and fraud are all dangers that should not be ignored. In response, the Law Commission is currently undertaking a four stage investigation into privacy issues. Stages one and two were completed in 2008. These stages involved an assessment of privacy values, changes in technology, international trends and implications for New Zealand Law, and consideration of whether the law relating to public registers required systematic alteration. In stage three, the Law Commission will investigate the adequacy of current civil and criminal law in dealing with invasions of privacy. In the final stage, the Law Commission will review the Privacy Act 1993 and make suggestions on how it can be changed.

The Privacy Act itself is often misquoted and misunderstood. If you have any issues regarding the collection, storage, and use of your personal information, please do not hesitate to consult the team at Turner Hopkins for advice.



SNIPPETS

Consumer Guarantees Update

Can a consumer take it upon themselves to arrange for the repair of defective goods and then claim the full cost back from the supplier or, must the consumer first give the supplier an opportunity to provide a remedy?

A 2008 High Court decision provides the answer – the consumer must first afford the opportunity to the supplier to remedy the defect. This is in line with the general policy of the Act that the suppliers of goods are liable to provide remedies as they, and not the consumers, should bear the risk of defective goods.

HUMOUR

Who's the Boss?

A legal executive, an associate and a partner of a large law firm are walking through a city park, when they spotted an antique oil lamp.

The legal executive picked it up, but both the associate and partner grabbed for it, arguing that they found it first. Their tussling had the effect of rubbing the lamp, and to their shock a Genie emerged in a great cloud of smoke.

The Genie announced, "In gratitude of your freeing me from the lamp, I grant you three wishes. As there are three of you, you each get one wish."

The legal executive blurts out, "I want to be in the Barbados, sipping cocktails with a gorgeous movie star." Poof! The legal executive was gone.

The associate, excited by the events, stammers, "I want to be in Hawaii, relaxing on the beach with a professional hula dancer on one side and a Mai Tai on the other." Poof! The associate was gone.

"You're last," the Genie says to the partner, "What is your wish?"

The partner replied, "I want those two back in the office after lunch."

OUR WEBSITE

Visit us on the internet at www.turnerhopkins.co.nz

NEWSLETTERS

If you would like to receive our newsletter by email please reply to helen.white@turnerhopkins.co.nz

Disclaimer: All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

TURNER HOPKINS
BARRISTERS & SOLICITORS

400 Lake Road, PO Box 33-237, Takapuna
Auckland 0622, New Zealand
Ph: (09) 486 2169 **Fax:** (09) 486 2160
www.turnerhopkins.co.nz