Confusion permeates the real estate industry regarding when the term “vacant possession” and “subject to tenancy” should be used. The confusion has arisen because of the vacant possession requirements of the Residential Tenancies Act 2010 (RTA) requiring the contract to specify “vacant possession” in order to obtain the 30 day termination period. Many agents have been told to mark “vacant possession” on their Agency Agreements where a tenant is still resident, but is on a continuing tenancy agreement. Let’s deal with the Agency Agreement process first: In signing up an Agency Agreement, most of the standard form Agency Agreements permit you to mark a box which indicates “vacant possession” or “subject to tenancy”. It is obvious that, if the tenant is in a fixed term period, “subject to tenancy” must be marked.

So.......what happens when it is in a continuing agency period? Section 55 of the Property, Stock and Business Agents Act 2002 (PSBAA) requires that for an agent to be entitled to obtain their commission they must comply with all Regulations. Schedule A of the Regulations require an agent to provide an inspection report at the same time as serving an Agency Agreement on a vendor. An inspection report is an issue of fact, that is, what is in existence at the present time. The issue of “vacant possession” and “subject to tenancy” is one of those issues which must be inserted into an inspection report.

Although a tenant is under a continuing tenancy agreement, they are still a tenant at law. Whilstever a tenant has the right to exclusive occupancy, they have a lease and therefore a right to tenancy. Therefore, it is important that on an Agency Agreement, “subject to tenancy” is used when a tenant is still in residence.
It seems foolish that this would not be done! A prospective purchaser should always be given the option of retaining the tenant or taking vacant possession. The fact that an Agency Agreement indicates “subject to tenancy” does not mean that the contract cannot be altered to provide “vacant possession”.

Now turning to the contract; When it is first issued to the agent, if a tenant is in residence, a lease must be attached to the Contract for Sale. This is a prescribed disclosure document under the Conveyancing Act 1919. As a purchasers solicitor, I would also like to have a look at the lease to ensure that the tenancy has lapsed and that a 30 day notice may be issued if my client wanted vacant possession. The Contract should not be ticked whether it is vacant possession or subject to tenancy. This is an issue that should be left open to negotiation between vendor and purchaser.

Finally, what happens at exchange? If a prospective purchaser wants vacant possession, the box “vacant possession” should be ticked. This permits a 30 day notice to be issued under the RTA giving 30 days notice for the tenant to vacate.

It is important to remember that, full disclosure is the only way of avoiding misleading deceptive conduct. Misleading and deceptive conduct will void any Contract for the Sale of Land. Failure to attach a tenancy agreement may mean that you have not fully disclosed the presence of a tenancy to a prospective purchaser. If it gets to the completion date and the tenant has not moved out, the Contract may be rescinded purely on the basis of misleading and deceptive conduct. It may allow the purchaser to avoid any notices to complete and make the Contract voidable at any time during its currency.

Please note that if a tenant is in residence, your agency agreement must be ticked “subject to tenancy”; the Contract for Sale of Land must have an attached tenancy agreement; and it is only at the time of exchange, if a lease has expired, that a decision is made regarding “vacant possession” or “subject to tenancy”.

Cheers,
Bailey Compton and The team at ACP/Leverage!
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