

Buying with other people



For some would-be homeowners, teaming up with others could be the best way to crack the real estate market. **Geri Forsaith**, licensed conveyancer and founder of Sydney Property Conveyancing, explains the legal issues you need to be aware of

Despite the recent drop in interest rates and housing prices, many would-be homebuyers still find it difficult to break into the property market. But by pooling resources with friends, family or even compatible acquaintances, it's possible to get a toehold in the property market sooner rather than later.

The risks

While buying a property with friends might seem fun at the start, but when circumstances change and one partner wants out, things can turn messy. Here are two of the most common risks:

1 Future home loan affordability is affected. Having responsibility for a loan jointly with others may make it harder to get a future loan for another property as affordability is assessed on an individual's income. If one co-owner wants to buy a second property, the bank will take into account that first loan – but they'll assess the whole loan as that borrower's responsibility.

2 One owner wants to sell up. Problems can also arise if one co-owner wants to sell when the others don't and you may end up in court which can be expensive and stressful. The party opposing the sale bears the onus of dissuading the court from ordering a sale. If a co-owner doesn't wish to sell, the court will look at whether the land is easily physically divisible and also at the costs of subdivision. The court will also look at hardship on the minority if the greater benefit to the majority were to prevail.

Minimising the risks

It's essential that you obtain advice from your conveyancer/solicitor before purchasing with another buyer, as everyone's situation is different.

When setting up the legal side of things, it's best to approach the process with the worst-case scenarios in mind. Even though it might seem a little depressing, you have to decide what will happen to the property if you break up with your partner for instance, or have a falling out with the other owner.

Step 1. Your legal will

Make sure you get a will drawn up by your solicitor to show who will inherit your assets. If you already have a will, ensure that it's updated with the new property details.

Thought should also be given to whether or not the co-owners give each other a Power of Attorney if one of the co-owners becomes incapacitated.

Step 2. The Co-ownership Agreement

In order to avoid disputes between co-owners, it's a good idea to draw up a Co-ownership Agreement to cover every conceivable issue. Costly disputes can be avoided if these issues are considered and solutions are agreed upon before the property is purchased.

The agreement doesn't have to be complex, but it will require you to have rules and agreements worked out in advance – this is crucial. For example, co-owners may agree that if one wishes to sell, the other co-owners have first right of refusal to buy their share.

Things to be considered should include:

- a sinking fund should be set up to cover repairs and for periods when the property is vacant
- the agreed time to hold the property before selling
- a plan to pay for unforeseen maintenance costs
- how various insurance issues will be handled
- taxation/depreciation and capital gains tax issues clarified
- on the sale to another co-owner, how will the sale price be determined
- who determines the rent and the tenant
- contribution of deposit and/or cost of the property
- which of the co-owners will live in the property and on what basis
- how sale proceeds will be distributed and why a sale would take place and how to resolve disputes

A Co-ownership Agreement should be arranged before purchasing and deciding which ownership structure to take (Step 3).

Step 3. Co-ownership structure

This is where you'll need to decide whether you'll set up the property under a Joint Tenants or Tenants in Common co-ownership structure. The differences are a vital consideration.

1 Tenants in common

Tenants in common is where each person has a share of the property and together they make up the ownership of the whole of the property. There can be any number of owners and the

shares need not be equal. For example, two people can purchase a property for \$600,000 with one person putting up \$400,000 (thus owning a share of two thirds) and the other \$200,000 (representing a one-third share). Or three people could put in \$200,000 each and have equal shares of one third a piece.

The shares are a measure of the amounts of money contributed by the co-owners in the purchase and is usually used by people buying investment property. It's also a popular choice for people who re-marry after having children from an earlier relationship as they're able to will their share of the property to their respective children.

- all tenants in common are entitled to physical possession of the whole property
- each tenant in common is required to state, in their will, who may inherit their share of the property
- tenants in common can acquire their interests (in the property) at different times and from different people
- each tenant in common is free to sell or otherwise deal with their interest in the property at anytime (unless there's in place a co-ownership agreement which contains terms restricting this)
- the interest in the land of each tenant in common is separate and distinct from the other

2 Joint tenants

The Land Titles Office estimates that in NSW, joint tenancies outnumber tenancies in common by a factor of 11 to one.

Joint tenants own the property jointly and equally – and there can be more than two owners – and don't hold proportionate shares of the property.

Each has a right shared with the others to the whole property but no individual right to any particular share in it. It has an 'all or nothing' nature.

The right of survivorship is an essential and necessary characteristic of joint tenancy. On the death of one joint tenant, the surviving joint tenant(s) will split the shares equally. If there's only one other tenant, they'll inherit the whole share.

This is regardless of what may be in the deceased person's will.

- it's usual for married and long-term de facto couples to own property in this

manner, as it's often their wish that their share of the property goes to their partner.

- in dealing with third parties such as a mortgagee, joint tenants must act as a single owner
- joint tenants must acquire the property at the same time from the same person
- all joint tenants are entitled to physical possession of the whole property
- each joint tenant can only act at the same time as the other(s)

In order to avoid disputes between co-owners, it's a good idea to draw up a Co-ownership Agreement to cover every conceivable issue

- you should still consider the impact on your overall asset position, from an estate-planning perspective

Joint tenancy may be severed if one joint tenant mortgages their interest (in the property) to a lender or by order of the Supreme Court and appoint trustees for the purpose of selling the property.

The mortgage

If the loan document has been signed by all co-borrowers, then each borrower is jointly and severally liable for each others' debts. So if one co-borrower fails to meet his or her loan repayments, the bank will hold the others liable for that debt.

Under standard mortgage documents, borrowers are typically in default 14 days after missing a single payment, even if only one co-borrower is in default.

Your lender may impose penalty interest of at least 2% on top of the existing rate from date of default.

If you can't make your mortgage payments then the bank may serve an order for possession and sale of your property, even if the other co-borrowers are meeting their obligations.

It also should be remembered that in the event of a marital or relationship breakdown, the Family Law Act and De Facto Relationship Act will apply and you'll need to obtain specialist legal advice from your solicitor.

If things go pear shaped

If problems arise and in particular if one party wants to sell their share, the parties will need to refer to their Co-ownership Agreement which should contain dispute

resolution clauses. If the parties still can't agree, the dispute may end up before the court, who'll then make the decision for them.

Also, be aware of the following:

- if one co-owner uses the whole property, without attempting to exclude the other(s), the co-owner occupying the property doesn't have to pay any rent or occupation fee to the other co-owner(s)
- if one co-owner spends money in

carrying out necessary repairs and maintaining the property, or pays for improvements on the property, without the consent of the other co-owner(s), that co-owner can't force the others to contribute for those expenses

- if one co-owner wants to sell their share and another doesn't, the Supreme Court may, on the application of any one or more of the co-owners, appoint trustees of the property and place the name of the property in such trustees, to be held by them on the statutory trust for sale or on the statutory trust for 'partition' otherwise known as subdividing or splitting the property.

Tread carefully

You'll need to carefully consider the legal implications of the method of co-ownership you choose and it's important to iron out any issues at the outset of buying the property.

Think about buying with like-minded people with similar goals and make sure you feel confident that the other partners are financially secure enough to make their repayments.

You should get detailed advice from your conveyancer/solicitor and have a written agreement put together to avoid disappointments for those who may inherit your property or costly disputes. **YM**



Geri Forsaith is a licensed conveyancer and founder of Sydney Property Conveyancing. Visit www.sydneypropertyconveyancing.com.au for further information. All views expressed in this article are her own