PropertySpeaking

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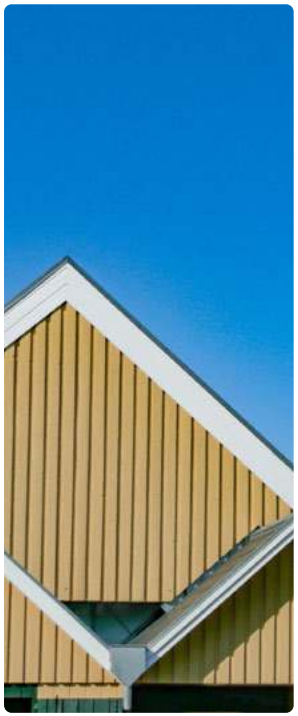
Welcome to the first edition of *Property Speaking* for the decade. We hope you find the articles both interesting and useful.

If you would like to know more about any of the topics we have covered, or indeed on any property law matter, please don't hesitate to contact us – our details are to the right.



Adapting the agreements can help property developers

Helps mitigate risk

There has been recent media attention on the way property development contracts are structured following the cancellation of a number of Agreements for Sale and Purchase by the developers of a project in Tawa, just north of Wellington. Reportedly, the developers said that without being able to cancel the existing agreements, the companies establishing the development would have otherwise faced liquidation and the development would have been halted.

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Agreement for Sale and Purchase of Real Estate

10th edition contains significant changes for buyers and sellers

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The changes include simplyfing the terminology used in the agreement, clarifying changes when fulfilling conditions and modifications to the listing of chattels.

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Update on Overseas Investment Act 2005

An overseas investor attempting to circumvent the requirements of the Act was fined $100,000 for a false statement to the Overseas Investment Office.

Refresher on privacy rights for tenants

Landlords must take care to avoid infringing their tenants' privacy rights. The Privacy Commission has re-released its privacy guidelines for landlords and property managers.

Proposed residential tenancy changes

The government is currently considering introducing more protection for tenants.

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The next edition of *Property Speaking* will be published in **Winter**.

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In this article we look at how agreements can be adapted to suit the specific characteristics of a property development and how they can help mitigate the risks (and costs) to developers. As well, we address some of the questions you should ask to determine where the risks and burdens of the development will fall.

Who will own the land during the development?

When undertaking a property development, you do not necessarily need to purchase the underlying land before on-selling to prospective buyers. Instead, you could make your purchase of the underlying land conditional on the development proceeding and the sections or houses being on-sold. This can limit the risk you will be unable to complete the development (because, for example, you cannot obtain the necessary consents for the development) after you have purchased the land.

Any of your sale agreements that on-sell properties in the development must account for the fact that the sale of the land to you will need to go ahead first or contemporaneously. This holds true for any agreements or events on which the development is dependent. If there is anything that must happen before you proceed with the development then your sale agreements should be conditional on that thing happening.

Who is responsible for the resource consent?

You can add clauses to any agreement to specify whether it is you, the owner of the underlying land or even the eventual buyer of a property in the development who is responsible for obtaining the necessary approvals and consents for developing the property. It is sensible to make both your land purchase and sale agreements conditional on the necessary approvals and consents being obtained. This will help ensure you are not bound to complete an unlawful development.

You also should consider who should approve the conditions imposed on any approvals or consent. To avoid onerous conditions being placed on you, you may want to specify that, before the agreements become unconditional, you must approve the terms and conditions of the resource consent or other relevant approvals.

The development takes longer than expected?

Under rules in the Resource Management Act 1991, all agreements entered into prior to the deposit of the survey plan are automatically conditional on the survey plan being deposited. Buyers are also entitled to cancel their agreement:

- Within 14 days of the agreement being signed by all parties, or
- Two years after the date the resource consent was granted or one year after the date of the agreement (whichever is later) if you have 'not made reasonable progress towards submitting a survey plan' or have 'not deposited the survey plan within a reasonable time.'

Aside from these rules, you can build clauses into your agreements that provide a shorter timeframe for the deposit of the survey plan or that allow you to cancel the agreements if the development is not completed within a specific timeframe. Known as 'sunset clauses', these can operate for either party's benefit depending on the wording. This was the type of clause relied upon by the developers in the Tawa situation when they

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The Auckland District Law Society and the Real Estate Institute of New Zealand (ADLS & REINZ) are the authors of the most common template Agreement for Sale and Purchase that is used by the majority of lawyers and real estate agents throughout New Zealand. In November 2019, ADLS & REINZ released the 10th edition of the agreement with changes that impact and benefit both buyers and sellers.

The 10th edition makes a number of changes to the agreement that include:

- Simplifying the terminology so it is consistent with the wording in the Land Transfer Act 2017
- Clarifying the obligations of the parties when fulfilling conditions, and
- Setting a clear distinction between chattels that have an operational function and those that don't.

Changes when fulfilling conditions

Finance condition wording: The finance condition no longer specifies with which lender the buyer needs to arrange finance, as long as the buyer takes all reasonable steps to obtain finance.

If you are unable to obtain finance and you want to cancel the agreement, you have an obligation to provide evidence of the steps you took to try and obtain that finance. You cannot use this condition to cancel if you simply change your mind about the purchase.

Toxicology report: There is now the option for a buyer to obtain a toxicology report as a standard condition in the agreement. If selected, the condition requires the buyer to hire a professional to test the property for drug contamination, primarily methamphetamine. The buyer has 15 working days to arrange the test to be done and to approve the written toxicology report.

Building report now must be in writing: The buyer now has 15 working days to arrange a builder to inspect the property and prepare a written report. If, for any reason, you don't approve the report you must supply the seller with a copy of the report.

Time for fulfillment: The finance condition date must be specified on the front page of the agreement. If you are a first home buyer and want to use your KiwiSaver to apply for a KiwiSaver HomeStart grant, we recommend that you have a finance condition of at least 15–20 working days.

The standard dates for the other conditions in the agreement have been aligned at 15 working days. These dates can be changed before the agreement is signed if you think you will need additional time to fulfill the condition.

Duty to fulfill conditions: Issues may arise while the buyer is trying to fulfill the conditions and the buyer may want to cancel the agreement. Where there is a condition in place, the party who benefits from that condition has a duty to take all reasonable steps to satisfy it. For example, you cannot cancel the agreement under a builder's report condition if you failed to obtain a builder's report. Also, if a bank will not lend you the full amount to complete the purchase, under the standard finance condition you could be required to exhaust all reasonable opportunities to obtain finance, that could include asking the seller for 'vendor finance'.

Changes to chattels listings

The 10th edition now separates the warranties that a seller provides for the property's chattels.

Schedule 2 lists the chattels with no operational function such as curtains or fixed floor coverings. Schedule 3 lists the

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Property briefs

There have been a number of developments around property investment by overseas investors and also on residential tenancies.

If you are an overseas investor or a landlord, you should ensure you are up-to-date with the latest changes and/or proposals.

Update on Overseas Investment Act 2005

An overseas investor attempting to circumvent the requirements of the Overseas Investment Act 2005 has received the first criminal conviction under that legislation. In February 2020, Dr Won Joo Hur was fined $100,000 for falsely stating to the Overseas Investment Office (OIO) that a property was not purchased on his behalf and providing a false loan document to support his version of events.

The OIO continues to take civil enforcement action against overseas persons who do not seek consent for relevant land purchases. Since 2015, the OIO has successfully sought financial penalties in the High Court and required the disposal of property in a number of cases where the Act's requirements were not met by overseas investors. In one such case, the High Court ordered civil penalties totalling $2,970,256[1].

These cases are a reminder that getting things wrong in this area can have serious consequences. It's essential that you check whether you might need OIO consent for a purchase *before* entering into any Agreement for Sale and Purchase of Real Estate. Also, if there is any change to your company's directors during the consent process, you must update the OIO. Otherwise, you risk delaying the consent process or there could be other penalties.

If you or your company have overseas connections, we can help with assessing whether your property purchase requires OIO consent and to work through the consent process with you.

Refresher on privacy rights for tenants

Privacy for residential tenancies continues to be a hot topic.

Recently a tenant was awarded $1,500 due to her tenancy being terminated in a retaliatory move by her landlord following a privacy breach by a tradesman. During bathroom renovations, the tradesman entered the tenant's bedroom – reportedly to find out why some ducks were quacking outside the property. After the tenant refused to allow the tradesman to return to the property, the landlord terminated her tenancy. The Tenancy Tribunal ordered the landlord to pay compensation to his tenant as he had failed to provide sufficient instructions about which areas of the house the tradesman could/should not enter.

As a landlord, you must take care to avoid infringing your tenants' privacy rights – either during the tenancy application process or throughout their tenancy. To help you navigate this area, we outlined some guidance around tenants' privacy in the Spring 2019 edition of *Property Speaking*.

Since we published that article, the Office of the Privacy Commissioner has re-released its privacy guidelines for landlords and property managers. The guidelines address questions such as:

- When can you ask a tenant for a criminal record check?
- What types of internet searches can you conduct on your tenants?
- What levels of information can you collect during the application process?

The new guidelines can be found **here**.

Proposed residential tenancy changes

Following the passing of the Residential Tenancies Amendment Act 2019, further law changes are now proposed for residential tenancies. The government is currently considering introducing more protection for tenants, including:

- Prohibiting landlords from inviting tenants to offer to pay more than the advertised rent (a bidding war)
- Increasing the minimum time between rent increases from 180 days to 12 months

1 *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561.

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Adapting the agreements can help property developers

were unable to complete the development without facing liquidation.

If you are considering including a sunset clause in your agreements, remember that any delay on your part in completing the development must be justified. This is because you will be obliged to do all things 'reasonably necessary' to complete the development before the due date of the sunset clause.

Changes to the survey plans or building specification?

If you are making sales early on in your development, it is possible that the survey plans for the land or specifications of the build will change as the development proceeds. To address this, in your sales agreements you should include some direction on how such changes will be dealt with. For example, you could include a clause that provides that the buyers will have no claim for compensation where the area of their land is slightly less than expected following the final survey.

We can help you identify risks

The issues discussed above are only some of the things to consider when structuring the agreements for your development. Whether any of the above will be useful in your development depends how far in the process you are and whether there is still opportunity to spread the risk of the development. By involving us early in the development process, we can identify risks which might arise during the development process and tailor the agreements to best manage and mitigate those risks. ●

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Residential tenancies

chattels that have an operational function such as a heat pump or the oven.

The seller must ensure that all of the chattels listed in both Schedules 2 and 3 are in the same condition that they were when the agreement was signed, except for fair wear and tear. The seller, however, now has an additional obligation to ensure the chattels in Schedule 3 are in working condition.

It is very important that chattels are included in the correct schedule.

Agreement must be carefully drawn up

It is important for buyers and sellers to remember that the ADLS & REINZ agreement is a template and it can, and should, be completed to fit your specific circumstances.

Before you undertake one of the biggest purchases of your life, make sure we discuss the conditions *before* you sign the agreement. ●

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- Making it easier for tenants to make 'minor changes' to a property
- Introducing a time limit on when landlords must provide Healthy Homes Standards information
- Requiring landlords to permit fibre installation except in limited circumstances, such as when the installation will compromise the structural integrity of the property, and
- Limiting the circumstances in which landlords can terminate a tenancy and removing landlords' ability to terminate a tenancy without reason.

If you would like to put forward your views on the proposed changes in the Residential Tenancies Amendment Bill, **public submissions** must be made to the Social Services and Community Committee by 25 March 2020. ●