Property Speaking

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Welcome to the Summer 2022 edition of *Property Speaking*; the final issue for 2022.

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

To talk further about any of these topics, 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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Negative equity on your property?

Not necessarily a nightmare

A negative equity position is where the value of a property that provides security for lending falls below the sum that has been borrowed. The issue is that if the bank ever required the lending to be repaid in full, the proceeds of the property sale may not be sufficient to repay the full loan amount.

With the current property market falling, this may put some property owners, particularly those who have recently purchased, in a vulnerable position.

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Vendor obligations after signing an agreement for sale and purchase

A case heard in the Supreme Court earlier this year presents a cautionary tale for property sellers.

A seller was embroiled in a long legal battle over their last-minute cancellation of an inspection for their buyer's due diligence condition after they became aware of a potential better offer on the property.

Sellers are required to meet any express obligations in the agreement they have signed.

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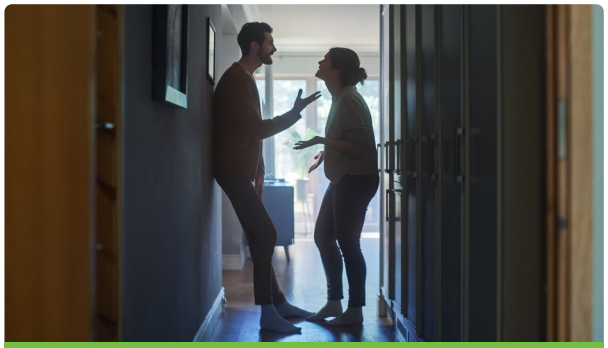

Property briefs

Victims of domestic violence can terminate tenancies

Changes in the Residential Tenancies Act 1986 now allow a tenant to terminate their fixed term or periodic tenancy if they are the victim of a domestic violence incident.

Body corporate rules beefed up

These amendments focus on the manner in which body corporates act.

Buying a property with unconsented works

Building work must meet the standards set out in the Building Act 2004 and the building code. Unconsented building work becomes a major problem when buying a house as many banks will not lend and most insurers will not provide cover.

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Negative equity on your property? Not necessarily a nightmare

What is negative equity?

A negative equity position is where the value of a property that provides security for lending falls below the sum that has been borrowed. The issue is that if the bank ever required the lending to be repaid, the proceeds of the property sale may not be sufficient to repay the full loan amount. With the current property market falling, this may put some property owners, particularly those who have recently purchased, in a vulnerable position.

Is it scary?

On the face of it, being in a negative equity position appears frightening. Lenders, brokers and other financial service providers, however, all indicate that it doesn't need to be scary, but it is fair to say it does make property owners uncomfortable.

The key for borrowers is to ensure they keep up regular loan repayments. Banks make money by collecting the interest paid on loans, so it makes little sense for lenders to race in and force homeowners to sell. Only where a borrower begins to stop their repayments (a 'default') does this risk materialise.

Impact of rising interest rates

The second aspect for borrowers who have seen their property slide into a negative equity position is that interest rates continue to rise. Meeting current repayments may be quite achievable, however, when it comes time to re-fix the interest rate and the repayment amounts increase, then the strain on finances becomes greater. If servicing your mortgage already stretches your household finances, keeping up with repayments at a higher rate can become unachievable.

What to do when times are tough?

Before leaping to conclusions and thinking the bank will turf you out of your house and force a mortgagee sale, talk with your bank first. The bank does not want to see you homeless, and it will usually work hard to help you.

Mortgagee sale is a last resort

Whether or not your property is in a negative equity position, the mortgagee (usually a bank but also sometimes a private entity or person) always has the legal right to exercise their mortgagee's power of sale where a borrower is in default on their loan.

The bank's right to sell your home when you are in default (and the process to do so) is set out in the Property Law Act 2007. The legislation states that the bank owes a reasonable duty of care to obtain the best price obtainable at the time of sale. This means that the bank cannot simply sell for a price that covers the principal debt and its own costs; it must get the best price possible. After a mortgagee sale is settled, the balance of the bank's debt any penalty interest and the bank's costs are paid and any remaining balance goes to the borrower.

In a negative equity position, where the best price for the property is insufficient to repay the loan amount, the mortgagee will usually transfer the unpaid balance of principal debt, interest and costs to a personal loan; it will be up to the borrower to negotiate the interest rate applied for that loan.

While banks always have the power to sell as a last resort, in practice, borrowers can find themselves months in default without their bank exercising this power. It is always in the bank's interest for borrowers to repay rather than force a sale. Usually, the borrower will receive several notices setting out the default and the penalty interest payable.

If the mortgagee believes that there is any chance of repayment, they are likely to agree to facilitate a repayment arrangement.

We can help

Going through this process can be intimidating; talking with us will help determine your rights, obligations, or what options you may have and can help limit any further debt or penalty being incurred.

Working together with us may also help you realise that the issue isn't as serious as the notice seems. We can help you negotiate an amicable way forward with your lender and, most importantly, do our best to ensure you get to keep your home. +

Vendor obligations after signing an agreement for sale and purchase

A case heard in the Supreme Court earlier this year presents a cautionary tale for property sellers[1].

In this case, a seller was embroiled in a long legal battle over their last-minute cancellation of an inspection for their buyer's due diligence condition after the seller became aware of a potential better offer on the property. The buyer argued that, because the seller's actions had prevented the buyer from gathering necessary information on the property, the seller could not also then cancel the agreement to pursue the better offer when the buyer was consequently unable to satisfy (or waive) the due diligence condition by its deadline. The Supreme Court's decision came more than two years after the dispute first arose and was only focused on some preliminary legal issues (rather than resolving the dispute fully).

For all sellers, this case signals that even though you have a signed agreement for sale and purchase, there is likely to be more for you to do than just wait for settlement day when money will change hands.

In many agreements, the next stages of the deal are not necessarily left to the buyer alone; there can be obligations that you as seller must meet. If you don't meet these obligations, you risk outcomes such as being pulled into a lengthy dispute preventing you from selling your property, as in the *Melco* case, or having your buyer request that money is held back on settlement. In this article, we cover some examples.

Meet any express obligations in the agreement

Your agreement might contain some express, deal-specific obligations for you as seller such as conditions you must meet or work you must complete before settlement. If you are using a standard ADLS/REINZ agreement, these obligations will be usually set out in the further terms of sale section.

Most agreements will also contain some warranties about the state of the property. For example, the standard ADLS/REINZ agreements contain warranties about the condition of chattels, rates payments being current and any work you have arranged on the property having appropriate consents.

Hopefully, where possible, you will have addressed any warranties before signing the agreement. If not, however, you must ensure that all warranties and other obligations are met by settlement day, otherwise this can lead to disputes around settlement, including the buyer proposing to retain settlement monies.

Help with the buyer's conditions where necessary

As highlighted in the *Melco* case, even where there is not an express obligation, you may have an implied duty to assist the buyer with meeting the buyer's conditions. You can help the buyer by, for example, providing any requested information in a timely manner and allowing access to the property.

The dispute in *Melco* also shows that even where you want to exit the deal, you should not do things like prevent your buyer from accessing the property for the purpose of gathering sufficient information for a due diligence condition. Taking this kind of action that deliberately blocks the buyer from fulfilling their conditions, or their own obligations under the agreement, could compromise your position.

Allow a pre-settlement inspection

Another area where a seller has obligations is pre-settlement inspections. Under the standard ADLS/REINZ agreement, the buyer may visit the property once for a pre-settlement inspection (with reasonable notice in writing). The buyer also is allowed another inspection to check you have met any agreement to carry out work on the property (no later than one day prior to settlement) if your agreement provides for such work.

Where your agreement provides for these types of inspections, you must allow this access, otherwise, the buyer could, for example, seek that money is held back until the inspection can take place.

Confusion can arise if the buyer wants to access the property for other purposes. If you want to allow this, you should be clear about the purpose of any access to avoid disputes about whether the access was for the set inspections under the agreement or for something else.

Failure to meet your obligations as seller can lead to long and costly disputes. Every agreement is different; please contact us for guidance about your obligations under your specific agreement to help avoid an outcome similar to what occurred in the *Melco* case. +

1 *Melco Property Holdings (NZ) 2012 Limited v Hall* [2022] NZSC 60

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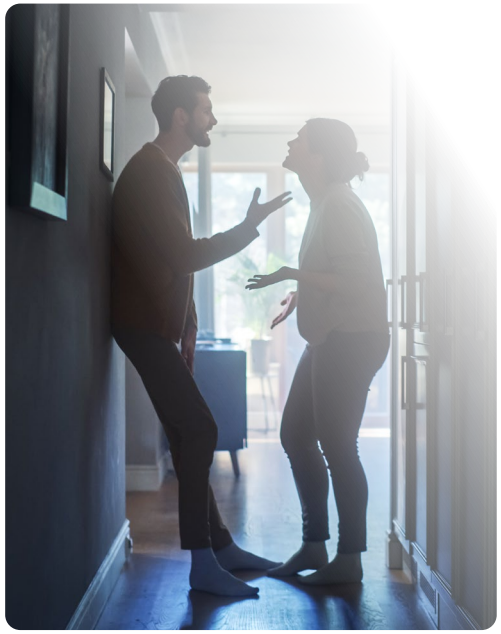

Victims of domestic violence can terminate tenancies

Changes to the Residential Tenancies Act 1986 (RTA) came into force on 11 August 2021 allowing a tenant to terminate their fixed term or periodic tenancy if they are the victim of a domestic violence incident.

Domestic violence under the RTA has the same definition contained in section 3 of the Domestic Violence Act 1995 and includes physical, sexual and psychological abuse.

If your tenant is a victim of domestic violence, they may exit from their tenancy agreement by giving you (the landlord) two days' notice. Your tenant needs to provide you with evidence of the domestic violence. It is important that when you receive notice from a tenant in this situation that you treat this with confidentiality and sensitivity, and meet your obligations under the Privacy Act 2020.

If your tenant is part of a group tenancy situation, they must notify the other tenants within two days after the date the tenancy expires. The remaining tenants are entitled to a two-week rent reduction that is calculated using the formula in section 56B of the RTA.

We can help you navigate the process if your tenant gives you notice to terminate the tenancy after a domestic violence incident.

Body corporate rules beefed up

The Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Act 2022 became law on 9 May 2022.

The purpose of the amendments is to:

1. Improve the information which sellers must provide to buyers of unit title properties. To help sellers in providing information, bodies corporate now have a duty to retain records and make information available to owners for the purpose of disclosure
2. Strengthen the governance arrangements for bodies corporate, which include expressly permitting committee members to attend a body corporate meeting by audio or audiovisual link, specifying that a quorum is met if owners holding 25% or more of the principal units are present (provided that, where there are two or more owners there is a minimum of two owners present for each meeting) and allowing committee members to vote electronically
3. Increase the professionalism and standards of body corporate managers by introducing a mandatory code of conduct, and
4. Ensure long-term maintenance planning and funding is adequate, and provide the ability to establish separate utility interests for different expenses. For example, if there are two units in a single storey development and one unit has twice the ground coverage of the other unit, then a separate utility interest could be established so the bigger unit pays for two thirds of the roofing costs.

The changes will come into effect on 9 May 2024 unless an Order in Council is issued to bring some of the changes in earlier.

Buying a property with unconsented works

Building work must meet the standards set out in the Building Act 2004 and the building code. Under the current system, there is a two-step process to have your proposed building work consented and signed off:

1. You must apply to your local council for building consent, and
2. The consenting council must inspect the work in order to issue a code of compliance certificate (CCC) confirming that the work has been completed in compliance with the building code.

If you fail to obtain the proper consent *and* the CCC then your building work is unconsented which leads to significant issues when you come to sell your property. Some banks will not lend to buyers of properties that have unconsented work.

What is most important is to check with your insurer to confirm you can get insurance cover before you sign the agreement. A condition of most, if not all, mortgages is that you keep the property fully insured. If your home has unconsented works, some insurance policies will not cover the unconsented area and some will not cover any damage where, for example, a fire originates in the unconsented area, even if the fire spreads to a consented area. In extreme cases, unconsented works could void your cover entirely.

For some situations, there is a process available to obtain a certificate of acceptance which is the council signing off on your unconsented building work. The process to obtain such a certificate changes from council to council. It may also not be available if too much time has elapsed.

It is important to do your due diligence, so you know what you are buying before you sign the agreement.

If you need any guidance on this, please talk with us. +

The next edition of *Property Speaking* will be published in **Autumn 2023**.