

Welcome to the Autumn edition of *Property Speaking*. We hope you find the articles of interest and useful to you. If you would like to talk further about any of the topics covered in this newsletter, please don't hesitate to contact us.

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The 'Solicitor's Approval' Clause

It cannot be used to cancel the Agreement on a whim

Have you ever signed an Agreement for Sale & Purchase without first giving it to your lawyer to consider? What would happen if something went wrong with the contract? You wouldn't be the first to believe that a 'solicitor's approval' clause will provide you with an out to cancel the Agreement. The courts, however, have held that such a clause provides only a narrow area of protection. A cautious approach pays, as has been highlighted by property purchases after the Christchurch earthquakes. You need to be aware that the solicitor's approval clause does not operate as an ambulance at the bottom of the cliff.

A solicitor's approval clause is often included in Agreements for Sale & Purchase. The exact wording of the clause/s may differ, but generally provides for the Agreement to be subject to your lawyer's approval as to title, form and content.

This does not mean that the clause can be used to cancel the Agreement on a whim. The courts have held that solicitor's approval clauses can only be used to cancel on the grounds of 'conveyancing aspects' of the purchase.

What is a 'conveyancing aspect'?

'Conveyancing aspects' have been interpreted by the courts to include legal impediments and their implications. For example, you might validly cancel the contract using the solicitor's approval clause if the seller is not the registered owner on the title and has no authority to sell the property. The nature and extent of easements is another example of a 'conveyancing aspect' covered by a solicitor's approval clause. A further requirement is that the solicitor's approval must not be withheld unreasonably, and the lawyer must act in good faith.

'Conveyancing aspects' does not include the general wisdom, or commercial advantages or disadvantages of the purchase. While many people often rely on their lawyer to provide advice on the overall merits of the transaction, this type of advice is not covered in the solicitor's approval clause. For example, in one District Court case¹ the property was leased to five separate tenants. The buyer's lawyer withheld approval on the grounds that the leases did not include personal covenants on the tenant companies. The High Court held that this was a decision as to the value of the transaction, rather than a 'conveyancing aspect'. The buyer's lawyer could not validly withhold approval on those grounds.

If your Agreement has failed to include conditions covering satisfactory finance or a LIM, a solicitor's approval clause cannot be used to plug the gap. For instance, the High Court has decided² that the absence of a 'subject to finance clause' in an Agreement was not a legal or conveyancing impediment and therefore could not trigger cancellation under the solicitor's approval clause.

Finally a solicitor's approval clause cannot be used to cancel the Agreement when either of the parties has simply found a better opportunity elsewhere.

Agreements are binding

If the contract cannot be cancelled under the solicitor's approval clause, your Agreement for Sale & Purchase will be binding despite the issues and defects. You may find yourself on the other end of an order for 'specific performance' to force you to complete the transaction or, if the seller has sold to another buyer, you may face a claim for loss on resale and penalty interest. For these reasons, it is always a good idea to see us before you sign an Agreement for Sale & Purchase. Do not rely on a standard form agreement to address all of the issues that may arise for that particular transaction. We can provide you with advice on a much wider range of issues, and avoid any problems further down the track if something does go wrong.

¹ Ward v Gibson [2009] DCR 360

² New Zealand Wines & Spirits (Properties) Ltd & Anor v Commercial Realities (NZ) Ltd (HC Wellington, A 413/82 & A 139/83, 23 May 1984, Savage J)

Total Destruction of Premises Subject to a Commercial Lease

What is 'untenantable'?

The recent earthquakes in Christchurch have, as we all know, caused massive damage to homes and, of course, the devastating loss of life. It has also had a major effect on business with many commercial premises being demolished or so badly damaged they are untenantable. This article will be of particular interest to readers in Christchurch, but it also has significant relevance to any leaseholder who finds their premises are unable to be used.

If your business premises are leased on the terms and conditions in the commonly used Auckland District Law Society (ADLS) Deed of Lease and are so badly damaged that they are untenantable, the situation is straightforward – the lease immediately terminates. This is automatic and does not require either you or the landlord to take any steps.

But how does a landlord or a tenant decide what untenantable means? Clause 26.1 in the ADLS Deed (5th edition 2008) says:

If the premises or any portion of the building of which the premises may form part shall be destroyed or so damaged

(a) as to render the premises untenantable then the term shall at once terminate; . . .

The Auckland High Court released the decision of Justice Priestly in *Trustees of the Manifold Trust v Trustees of the Kevin Rand Family Trust*³ on 1 April 2011. In this case the Kevin Rand Family Trust owned a commercial property in Auckland, the first floor was leased to the Manifold Trust using the ADLS Deed of Lease. There was a serious fire at the premises that caused extensive damage. One of the questions before the court was whether the premises were untenantable and therefore had the lease been lawfully terminated?

Justice Priestley restated the definition of 'untenantable' in the New Zealand Court of Appeal decision *DFC New Zealand Limited v Samson Corporation*⁴:

Nothing more nor less than able to be used and enjoyed by tenant. Within the general catalogue of clause 26, subclause (a) involves some degree of permanence. In other words, something which is merely transitory or temporary will not make a building untenantable. However, where there is a substantial interference with the tenants ability to enjoy, use and operate particularly when one is talking about commercial premises, then you have untenantability.

Justice Priestley went on to say that the premises were untenantable as they were not capable of being used for the tenant's purposes or the purposes of the lease. The repairs took 10 months to complete. The meaning of untenantable is to be determined objectively on the facts in each case. Justice Priestly wrote at paragraph 26 of the judgment, "Certainly the focus of the inquiry must be whether the premises are capable of being tenanted by the lessee, who in terms of a lease went into the premises for a specific purpose and for a specific term. The tenant's purpose is extricably tied up with the permitted use of the premises."

If leased premises are untenantable and the lease terminates then neither party can enforce the terms of the lease against the other. The landlord cannot demand payment of rent, and the tenant cannot demand possession of the premises. The parties can, if both the landlord and the tenant agree, agree that the lease remains valid and enforceable.

If your leased premises are damaged do talk with us. We can help advise whether the damage has made the premises untenantable or not, and what your options may be.

Property Briefs

Christchurch earthquake: buying property

Property buyers and sellers, together with their lawyers, are generally adapting well to the difficult circumstances surrounding the recent Canterbury earthquakes.

If you are buying property, do listen to your lawyer's advice before entering into an Agreement for Sale & Purchase (there's more on Agreements on Page 2 of this newsletter). These days, post-earthquake, the common practice in property transactions in Canterbury is for the Agreements to be subject to suitable engineers' reports, appropriate insurance for the property and suitable finance all to be arranged. It has also been noted that some lenders have been requesting purchasers' (or the owners if they are re-financing) confirmation that there has been no further damage to the property from after-shocks.

Many lenders require copies of those engineers' reports, insurance details and, in some cases, an independent valuation before finance for any purchase can be put in place. That abundance of caution shown by lenders is necessary to ensure that the property provides suitable security to the lender for loans advanced to the buyer or owner of the property.

Where an EQC claim has been made for the property prior to its sale, the EQC claim should be assigned by the seller to the buyer on purchase of the property to ensure the claim process can continue for the property and the benefit of the buyer.

GST on land transactions

On 1 April 2011, the GST position for some land transactions took effect. Where property including land is sold between two GST-registered parties, the transaction will be 'zero-rated' for GST purposes. The new legislation does not apply to properties that are purchased where the buyer will occupy the property as his (or her!) principal place of residence. In those circumstances, GST will continue to be payable on the purchase price.

There are new terms of sale to be attached to the Agreement for Sale & Purchase agreement where the zero-rating of GST is to apply. Also, a buyer must also complete a declaration that the property will not be used as his or her principal place of residence after purchase is complete.

Buyers of GST zero-rated property should also note that where the use of the property changes after its purchase, the buyer may be required to pay GST on the purchase price.

If you have any concerns about whether this situation relates to your individual circumstances, we strongly recommend that you consult with us before signing the Agreement for Sale & Purchase.

Legislation updates

Unit Titles Act 2010: This new legislation and its regulations are expected to come into effect in June this year. Details of the exact content of the regulations are, however, yet to be released. It is expected that significant changes will be put in place for sellers to unit title properties to make disclosures to buyers regarding body corporate operations, maintenance programmes and sinking funds. It is likely that bodies corporate will be required to have an up-to-date maintenance programme showing forecast future maintenance expenditure for each property owner.

Abolition of gift duty: A reminder that gifts (including the forgiveness of loans owed) made after 1 October 2011 will no longer be subject to gift duty. That removal of gift duty will allow trust gifting programmes to be completed more easily.

Review of trust law: It should be noted that the Law Commission is reviewing trust law in New Zealand. We will bring any changes to trust law to your attention. In the meantime, however, we remind you that annual trust meetings should be held, and trustees' resolutions and minutes should be recorded to ensure the trust's record keeping is up-to-date. Regular meetings and good record keeping by trustees will be evidence of a trust's proper and legitimate existence, and its independence from its beneficiaries.