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# CONVEYANCING BULLETIN

## In this issue




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# Sale of land: due diligence

***Don McMorland*** *considers the approach of the High Court and Court of Appeal on the application of the rules governing the implication of terms into a due diligence condition and the extent to which a vendor can owe a duty to the purchaser regarding the operation of such conditions.*

*Melco Property Holdings (New Zealand) 2012 Ltd v Hall*

[2020] NZHC 2831

*Melco Property Holdings (New Zealand) 2012 Ltd v Hall*

[2021] NZCA 184

*Due diligence condition — implication of terms*

## Facts

This case had humble beginnings, coming before the Court as an application by the purchaser of a property for an order that its caveat do not lapse. However, the substance of the decision lies in the operation of a due diligence condition within the agreement for purchase. The agreement was in the Auckland District Law Society-Real Estate Institute of New Zealand (ADLS-REINZ) (9th ed 2012 (8)) form but contained quite a detailed due diligence condition inserted as cl 19.

The date of the agreement was 6 December 2019 for a price of $1,500,000 plus GST (if any), and the due date for the fulfilment of cl 19 was 9 January 2020. The property was in Lower Hutt and the purchaser, Melco Property Holdings (New Zealand) 2012 Ltd (Melco), concerned with the seismic stability of the building, wished to obtain an expert's report before declaring the contract unconditional.

Because all of this was happening over the very busy pre-Christmas period, the structural engineering firm approached by Melco for a report told Melco that it would not be able to provide it until 17 January 2020. On 23 December 2019, Melco asked the agent to ask the vendor, Mr Hall, whether the fulfilment date for the condition could be extended to 17 January 2020, and on 24 December 2019 Melco sent an email direct to Mr Hall requesting the same extension. Nine days later, on 26 December 2019, Mr Hall replied that he could see no issues with the request but that he would discuss it with his solicitor who was expected to return to work on 9 January 2020.

On 6 January, Melco — concerned about the due diligence condition — engaged a second company, EQ Struc Ltd, to provide the seismic report.

Many events occurred on 7 January 2020. In chronological order, they were the following:

- Mr Hall left for a camping trip in the Tararua Ranges, where there is limited cellphone coverage.
- Melco sent a text to Mr Hall asking for the keys to the property for the purpose of the inspection.
- Melco asked EQ Struc Ltd whether it would be possible for it to provide its report prior to 10 am on Friday, 10 January, to give time to review the findings.
- EQ Struc Ltd responded that if it could have access to the building the next day, 8 January, that would be possible.
- During the afternoon, contact was made with Mr Hall who said he would get back to Melco the next day as to whether he could allow Melco access to the property.
- Later that day (7 January), Mr Hall sent a text to Melco that he would be in Wellington on 9 January and would speak to the solicitor then about Melco's request for an extension of the condition.

Further events occurred on 8 January which did not advance matters, though Mr Hall did receive a telephone call from a third party who had heard that the property was on the market. As the judgment says at [21]: "This caused [Mr Hall] to reflect on his decision to sell the property."

On 9 January, after a further attempt that morning to obtain an extension of the condition, Mr Hall instructed his solicitor to cancel the agreement as soon as he was able to do so. Also, during that morning, Melco received a preliminary seismic report from the first consultant it had approached. This report indicated concerns and that a full inspection of the building was required, which that firm could not do until the following week. On 9 January, Melco neither confirmed nor waived the due diligence condition. At 5.30 pm, Mr Hall's solicitor sent — by email — a letter purporting to cancel the agreement on the basis of the failure of the condition. On the following day, Melco's solicitor replied that their client did not accept the cancellation and would enforce its rights under the agreement. On 16 January, the caveat was lodged.

On 23 January, Mr Hall entered into an agreement with a third party for the sale of the property for $1,600,000. This agreement was conditional on Melco removing its caveat, which Melco did not do, and that second agreement came to an end.

In a letter of 24 January, Melco purported to waive the due diligence condition, stating that the contract was unconditional and that Melco was willing to commence proceedings for specific performance.

## High Court

### *Submissions*

In the hearing of the application to sustain the caveat various submissions were made.

The first was that a term should be implied into the due diligence condition that the parties would cooperate and that neither would prevent or delay performance of the condition. To give this more detail, it was also argued that there was an implied term that Mr Hall was obliged to do "everything necessary" to allow Melco access to the property to obtain a seismic report, and that Mr Hall would communicate to Melco his intention not to grant an extension of the due diligence condition.

If these implications could be made, Mr Hall was in breach of these obligations and could not take advantage of his own breaches to avoid the agreement which, therefore, remained on foot.

Alternatively, in deciding whether to grant or refuse the extension, Mr Hall was exercising a unilateral discretionary contractual power which is subject to a "default rule" that such a power will not be exercised arbitrarily, capriciously or in bad faith, and that Mr Hall had acted in bad faith in failing to communicate his rejection of Melco's request for an extension of time before the due date for the fulfilment of the condition.

### *Judgment*

The reasoning in the judgment begins with the following proposition, that (footnotes omitted):

> [37] As a matter of law, a party to a contract will not be allowed to assert that the failure of a condition has terminated any contractual liability if the condition has only failed through that party's own default.
>
> [38] The implication of terms that parties shall cooperate and that neither will conduct themselves so as to prevent or delay performance of conditions is governed by the same principles applying to the implication of other contractual terms.

It was, therefore, necessary to argue that such a term could be implied into the condition, and thus to engage the general law rules about the implication of terms into a contract.

The Supreme Court in *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48, 17 NZCPR 680 at [79]–[80], in its judgment delivered by William Young J, adopted the principles governing the implication of terms given by Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at [40] and in *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, [2009] UKPC 10, [2009] 2 All ER 1127 at [16]–[27] per Lord Hoffmann for the Court.

Lord Simon had said that, for a term to be implied into a contract, the term:

(1) must be reasonable and equitable;
(2) must be necessary to give business efficacy to the contract;
(3) must be so obvious that "it goes without saying";
(4) must be capable of clear expression; and
(5) must not contradict any expressed term of the contract.

Lord Hoffmann added a gloss to these requirements, namely that an implication of a term be necessary to give effect to the reasonable expectations of the parties, complementing the requirement to give business efficacy to the transaction. These principles were noted and adopted by Associate Judge Paulsen (at [40]).

The Associate Judge then turned his attention (at [41]–[50]) more specifically to whether a term imposing an obligation to give access to the property for the purpose of due diligence might be implied on the facts of this case. Clause 19 of the agreement expressly provided that the purchaser's due diligence investigation could extend to matters concerning both the value and the condition of the property. This included the extent to which buildings on the property were earthquake prone and seismically sound. The Associate Judge was satisfied (at [42]) that there was an arguable case for the implication of a term that Mr Hall would provide Melco with reasonable access to the property to complete its due diligence and that this included an engineer's seismic report. It was also clear, on the evidence, that to complete such a report the engineer would require access to undertake a physical inspection of the building.

The Associate Judge also referred to Australian authorities *Grubb v Toomey* (2003) 12 Tas R 205, [2003] TASSC 131 and *Grieve v Enge* [2006] QSC 37, in which implied terms permitting access to the property for the purpose of the fulfilment of a condition, a valuation for finance in both cases, were implied. The Court also considered *Connor v Roberts* [2002] DCR 29, which concerned a contract for the sale of shares and stock in a company subject to the condition that the purchasers were satisfied that the company had no liabilities that would diminish its share value and that the company could give clear title. The condition was for the benefit of the purchasers, but the requisite information was peculiarly within the knowledge of the vendors who, therefore, had an obligation to provide that knowledge.

On the present facts and submissions, the Court considered (at [49]) that an implied term that Mr Hall would provide Melco with reasonable access was both capable of clear expression and did not contradict any term of the agreement; but rejected a submission for Melco that Mr Hall was required to do "everything necessary" to provide access when Melco demanded it, seeing such an obligation as unreasonable. Neither did the Court accept a submission for Mr Hall that he had no obligation in respect to due diligence except to provide information. Although cl 19 did not speak of access, it was only by that means that Melco could obtain the necessary information to satisfy the condition.

The issue, therefore, was to determine on the facts whether Mr Hall had satisfied his obligation to provide Melco with reasonable access. The Court decided (at [51]), on the evidence, that there was a case that Mr Hall had satisfied his obligation. Melco had been aware from at least 12 December that Mr Hall did not have a seismic report which could be made available. It was given access and carried out inspections of the property on 16 and 17 December yet made no request of Mr Hall for inspection by a seismic engineer until 7 January, two days before the condition date. Mr Hall, at that point, was out of Wellington. Though Mr Hall initially agreed to an appointment for an

inspection, his evidence was that he was unable to keep that appointment. The Court concluded that whether Mr Hall was in breach by failing to keep that appointment was a trial issue, which could not be decided on the present application to sustain the caveat, and referred (at [54]) to *Nopera Log House Ltd v Godsiff* [2014] NZHC 639, (2014) 15 NZCPR 144 as a similar case.

A subsequent teleconference was convened with counsel to hear further submissions on this issue. The submissions made on behalf of Melco were rejected as being either unsupported by evidence or being potentially contradicted by evidence.

Finally, it was submitted for Melco that Mr Hall's failure to communicate his refusal of an extension deprived Melco of the opportunity to waive the condition. Again, the submission was rejected. As the Associate Judge explained (at [60]), Mr Hall was subject to no express obligation to do so under the agreement and such an obligation could not be implied as it did not meet the requirements for an implied term. He also pointed out that to imply such a term would require Mr Hall to prefer the commercial interests of Melco in the performance of the agreement to the detriment of his own interests in bringing it to an end. It could also be mentioned that Melco had, in any event, clear knowledge of the condition date and could have waived the condition had it wished. As the Court said (at [63]), "[i]n the absence of a response, Melco must have known its options were to waive the condition or do nothing and risk cancellation of the agreement".

Every case turns on the detailed evidence before the Court. The absence of sufficient evidence on crucial points in this case, in particular whether Mr Hall's conduct amounted to a breach of the obligation to provide access to the property on 8 January 2020 to enable the completion of a seismic report, meant that the application to sustain the caveat had to be declined.

The Judge drew a number of conclusions (at [64]-[68]). He accepted (at [64]) that Mr Hall was obliged to give Melco reasonable access to the property to conduct due diligence, but could not resolve on the present application whether he had breached that obligation by not providing access on 8 January 2020.

Melco had, however, failed to satisfy the Court that it was arguable (the test for sustaining a caveat) that Melco's failure to fulfil the condition was caused by any default by Mr Hall. There was no satisfactory evidence that Melco could have satisfied cl 19 before it expired or that it would have waived the condition (at [65]).

Mr Hall had no obligation to advise Melco that he had decided not to grant an extension, but neither was Melco's decision not to waive the condition caused by any default of Mr Hall (at [66]).

As cl 19 was neither satisfied nor waived, Mr Hall was entitled to cancel the agreement, and he did so when written notice was given to Melco's solicitor at 5.03 pm on 9 January 2020 (at [67]). Melco's equitable interest in the property expired on the avoidance of the contract (at [68]). The application to sustain the caveat was dismissed, and it was ordered that the caveat lapse (at [69]).

## Court of Appeal

### *Judgment*

As the Court stated (at [35]-[37]), in the context of an application to sustain a caveat, the onus was on Melco — the caveator and applicant — to make a reasonably arguable case that the vendor was not entitled to avoid the agreement on the basis, in this case, of non-fulfilment of the due diligence condition. This onus required Melco to show a reasonably arguable case that either Mr Hall was in breach of his own obligations under the agreement or had made some concession or given some binding assurance, such that his purported avoidance of the agreement was ineffective.

The following part of the judgment discusses the obligations of a vendor, and in particular Mr Hall, under an agreement containing a due diligence condition. The Court accepted (at [39]) that the condition carried with it the obligation for the vendor to provide reasonable access to the property for the purpose of enabling the purchaser to exercise the right to undertake due diligence. In the context of the present facts, there was no doubt that obtaining a seismic stability report was within that scope.

The Court then went on to analyse the facts as proven in evidence. On 24 December 2019, Mr Dee — the real estate agent acting for Melco — asked the vendor to extend the period for the satisfaction of the condition to 17 January 2020. Mr Hall's reply on 26 December was equivocal. The Court then said (at [42]): "[b]ut that has nothing to do with his obligation to provide reasonable access." A distinction is clearly being drawn between an obligation to provide reasonable access within the period agreed in the original contract for the duration of the condition, and an extension of that period. There is no obligation to extend the period to allow further steps of due diligence to be taken outside the agreed contract period.

The Court then went on to consider the events of 7, 8 and 9 January 2020 which were said (at [43]) to be the only events which could "bear on Mr Hall's obligation" to provide reasonable access. After stating those facts, the Court (at [47]) said:

> In our view, it is reasonably arguable that in the context of a tight period for due diligence and a looming deadline, Mr Hall's behaviour on 7, 8 and 9 January 2020 breached his obligation to provide Melco with reasonable access to the property.

However, the Court went on to say (at [47]) that it did not express an opinion on whether it did breach the obligation or not: "[t]here are obvious arguments both ways." Nevertheless, in terms of the burden of proof to sustain a caveat, it was not — in the Court's view — clear that the argument was not reasonably available to Melco.

Beyond that, however (at [48]), the onus was also on Melco to show a reasonably arguable case that, had Mr Hall given access to the property in the period of 7, 8 or 9 January 2020, Melco would have fulfilled the condition either by confirming or waiving it. This relates to the need to make a reasonably arguable case that the equitable interest claimed by Melco and protected by the caveat still remained at the

date of the judgment. On this point, the Court accepted the Associate Judge's analysis that there was no evidence that access to the property would have generated a seismic stability report, oral or written, before the 9 January 2020 deadline. The Court (at [52]) expressed the view that, in the absence of evidence as to what would likely have happened if Mr Hall had granted access during the 7–9 January 2020 period, Melco could only invite speculation, and that "is not enough to discharge its onus".

It followed that the Court below was correct to find that there was not a reasonably arguable case that Melco's failure to fulfil the due diligence condition was due to Mr Hall's default. The application to sustain the caveat, therefore, failed.

The Court of Appeal also expressed its agreement (at [55]) with the Associate Judge that Mr Hall, the vendor, had no obligation in good faith to tell Melco that he would not extend the condition period. He had never promised to extend the period; rather, he had always been equivocal as to whether he would. Neither had he any obligation to alter the agreed terms of the contract by extending the period. The Court also noted that the uncontradicted evidence of the vendor was that he did not learn of the alternative purchaser until after he had cancelled the 8 January 2020 appointment. The Court accepted that the evidence was that Mr Hall decided on 9 January 2020 not to extend the condition deadline.

## Comment

These judgments look at the application of the rules governing the implication of terms into conditions and illustrates the extent to which a vendor can owe a duty to the purchaser, at least under a due diligence condition.

Much of the High Court judgment is concerned with whether a term could be implied requiring the vendor to allow access for an engineer to prepare a seismic report, an obligation which is readily accepted by the Court of Appeal without discussion (at [39]) — though at that level it was not contested by the vendor. Clause 9.4(3) of the ADLS-REINZ standard form concerning a building report makes express provision that the vendor must allow the building inspector to inspect the property at all reasonable times and on reasonable notice for the purpose of preparation of the report. A similar provision is made in cl 9.5(4) for the purpose of carrying out the testing and preparation of a toxicology report. There is no clause included in the standard form for a due diligence condition, though obviously it would save argument if such a condition were drafted to include such a right of access at reasonable times and on reasonable notice.

There is also a further line of argument which was neither relied upon in submissions nor discussed in the judgments. The submissions made to the High Court and the reasoning in the judgment omit any reference to the judgment of the Privy Council in *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1 (HL) at 9, lines 37–46, where Lord Atkinson said:

> [I]f the stipulation [in the contract] be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings about that event, cannot be permitted either to insist upon the stipulation himself, or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a round-about way, but in either way putting an end to the contract.

This principle, which presumably applies equally when the failure of the condition gives either or both parties the right of avoidance of the contract, was neither argued nor considered in the present case. However, it is interesting to speculate whether it did place an obligation on Mr Hall to act, albeit contrary to his own interests, by informing Melco that he had decided not to grant an extension. It is not clear on the facts in evidence whether Mr Hall decided to withhold approval on the eighth or on the ninth of January, though it was on the ninth that he instructed his solicitor not to respond to the request for an extension. The Court of Appeal (at [47]) did not express an opinion but did say that, in its view, it was not clear that the argument that Mr Hall had breached his obligation was not reasonably available to Melco.

The primary issue in this case was whether the avoidance of the contract by Mr Hall was valid. If it was invalid, although the due date for the fulfilment of the condition had passed, neither party had avoided the contract and it continued in force and was able to support the caveat. If this principle did apply, and if it did place an obligation on Mr Hall to act contrary to his own interests by advising Melco of the refusal of the extension, was he entitled to rely on his own default under the principle to avoid the contract?

It should be considered whether Mr Hall's obligation under this principle was actually to grant the extension of time. It is submitted that the principle does not extend to requiring an extension of time for the fulfilment of the condition which would be an alteration of the terms of the contract, a conclusion with which the Court of Appeal would obviously have agreed (see at [42] and [48]). But, the principle may well have extended to informing Melco of the refusal of the extension, thereby placing Melco in the clear position of having either to confirm the fulfilment of the condition or to waive the condition if it wished to save the contract.

Because Melco had neither given notice of fulfilment of the condition nor waived it, Mr Hall — prima facie — had a right of avoidance. Assuming that Mr Hall was in breach of an obligation to inform Melco of the refusal to extend the time, the issue becomes whether that deprived him of the right of avoidance. In terms of the principle, would he be "taking advantage of his own wrong"?

The answer given by the Court of Appeal (at [48]) was that, in the context of an application to sustain a caveat, the onus was on Melco as the applicant to show a reasonably arguable case that had access been given to the property in the period of 7, 8 or 9 January 2020, it would have fulfilled

the condition by either confirming or waiving it. It is difficult to see how such an arguable case can be made when, during that period and subsequently, Melco was plainly unaware of what the report would reveal about the seismic stability of the building. It would have to somehow show that, even if the report had revealed potential instability, it would nevertheless have confirmed the contract. Given its evident concern about seismic stability, that would have been unlikely or at least difficult.

Mr Hall was plainly entitled to refuse the extension, but what was the effect of the failure to advise Melco of that refusal? Despite the lack of an answer to the request for an extension, Melco knew, at least through its solicitor, that the due date for the fulfilment of the condition had arrived, that no extension had been granted, that it did not have the right to — or at least the ability to — access the property, that it had received on the morning of the ninth a preliminary seismic report which "indicated concerns", and that (in legal terminology) it was put to its election either to give notice of the fulfilment of or to waive the condition, or to avoid the contract. It failed to do any of these. It also knew that after 5 pm on the ninth of January, Mr Hall would have the right to avoid the contract, which he did.

Arguably, the lack of advice that the extension had been refused did not alter Melco's knowledge of its position or its rights. If that is so, in terms of the principle, it would be strongly arguable that Mr Hall, by avoiding the contract, would not be taking advantage of his own wrong.

This is an interesting decision which explores and illuminates certain fundamental aspects of the working of a due diligence condition. Perhaps the lesson is that, in entering into a contract with such a condition, the purchaser — and possibly the real estate agent who does have certain responsibilities to a prospective purchaser (see for example, r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012) — should be very aware of the definition in the ADLS-REINZ agreement of a "working day" (cl 1.1(37) and of the time for performance (cl 1.3)).

**Sale of Land** [5.02], [5.05] and [5.07]
DWMcM

# Sale of land

## *Downer v Signature Developments Ltd*

[2020] NZHC 2488, (2020) 21 NZCPR 416

*Cancellation — essential term — breach by vendor — repayment of deposit to purchaser*

Mr Downer, as purchaser, and Signature Developments Ltd (Signature), as vendor, entered into an agreement for sale and purchase (ASP) of a property upon which Signature would build an early childhood education centre. Clause 26 of the ASP provided that the property would be subject to a tenancy, under which Kindergarten New Zealand Ltd (KNZ) would be the tenant on the terms and conditions set out in an attached agreement to lease (ATL) between Signature and KNZ, which Mr Downer had received and approved.

Without seeking or obtaining Mr Downer's approval, Signature consented to KNZ assigning the ATL to Pukekohe Educare Ltd, a subsidiary of Educare Group Ltd, with the consequence that KNZ would not have been the tenant Mr Downer anticipated on the settlement of the purchase as contracted.

Mr Downer maintained that by entering into a lease with Pukekohe Educare Ltd, Signature had breached cl 26 of the ASP and that cl 26 was an essential term of the ASP. In the alternative, he argued that the breach substantially reduced the benefit to him of the ASP. He therefore cancelled the contract pursuant to either s 37(2)(a) or s 37(2)(b)(i) of the Contract and Commercial Law Act 2017.

The first issue considered by the Court was whether cl 26 of the ASP had been breached. That was a threshold issue under both of the provisions relied upon by Mr Downer. It was held (at [64]) to be clear from the wording of cl 26 in the context of the ASP, which would become complete at settlement, that the clause was a promise that KNZ would be the tenant at settlement. This conclusion was reinforced by a further provision of the ASP, under which the date of settlement was also to be the commencement date of the lease. There was also a provision in the ATL which expressly prohibited KNZ from making an assignment of the ATL. Justice van Bohemen also referred (at [70]) to the basic principle that during the life of an ASP, and subject to the terms of the contract although the vendor remains in possession of the land until settlement, the purchaser has an equitable interest in the property and the vendor is treated as a trustee of the property for the purchaser. For all of these reasons, Signature was held (at [83]) to be in breach of the ASP.

In terms of s 37(2)(a), the next issue was whether cl 26 was an essential term of the contract. Applying the principles laid down by the Supreme Court in *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805, (2010) 11 NZCPR 505, van Bohemen J was satisfied (at [94]) that, more probably than not, Mr Downer would have declined to enter into the ASP unless it had been agreed that cl 26 and its identification of KNZ as tenant were essential. It was also held (at [98]) that there had not been sufficient and substantial performance of cl 26. It therefore followed that Mr Downer was entitled to cancel the contract.

In the light of this finding, it was not strictly necessary to consider the argument under s 37(2)(b)(i), which relied on it being established that the breach had substantially reduced the benefit of the contract to the purchaser. Again, the Judge was satisfied (at [102]) that the assignment of the ATL did substantially reduce the value of the ASP to Mr Downer.

Mr Downer was, therefore, entitled to the return of the deposit plus interest at five per cent under s 24(1)(a) of the Interest on Money Claims Act 2016 and reg 4 of the Interest on Money Claims Regulations 2019 from the date of its

payment to the date of its repayment.

**Sale of Land** [12.02(d)]
DWMcM

### *Glenvar Vault Capital Ltd (in liq) v Foster Crescent Ltd*

[2020] NZHC 2432, (2020) 21 NZCPR 402

*Purchase from an insolvent company at an undervalue — Companies Act 1993, s 297*

This judgment concerns the recovery of the difference when, in this case, land has been transferred by a company at an undervalue within two years of its liquidation. Broadly, s 297 of the Companies Act 1993 provides that the liquidator of a company may recover from a person (X) the difference between the value that X received from the company under a transaction to which the company was a party and the value that the company received from X under the transaction.

To state the facts broadly, Glenvar Vault Capital Ltd (Glenvar) was contracted on 14 November 2017 to purchase a property for $711,000 with a 10 per cent deposit of $71,100. Glenvar did not have the funds to pay even the deposit, which it borrowed from a third party. As the settlement date, 2 April 2018, approached, Glenvar borrowed a further $25,000 from the same lender as it attempted to put itself in the position to complete the settlement.

Still, Glenvar was unable to settle and after further attempts to put itself into the position to do so, including the payment of a further $20,000 as non-refundable deposit, it nominated Foster Crescent Ltd (Foster) as assignee of Glenvar's obligations under the agreement and to take title to the property. Foster completed settlement with the vendors on 18 May 2019 by paying the balance of the funds owing on the purchase ($620,000) and receiving title. Glenvar went into liquidation on 13 November 2019.

The financial result for Glenvar of these various dealings, as found by Powell J, was that Glenvar had paid a total deposit of $91,000 which was not paid, or required to be paid, by Foster to Glenvar.

The various requirements of s 297 were met. The nomination of Foster was held to be a "transaction" in terms of s 297(3)(a), which defines the term as having the same meaning as in s 292(3). In the latter provision, the term is defined as including "conveying or transferring the company's property", a definition which included a nomination enabling the nominee to complete the purchase and take title to the property. In *Glenvar Property Holdings Ltd (in liq) v 153 Holding Ltd* [2016] NZHC 2272 at [30]–[31], Downs J had discussed the meaning of "transaction" in the context of these provisions and also in the context of a deed of nomination by the purchaser named in the contract, holding that the term "has been given the widest possible meaning by the courts, and includes 'every means by which property may be passed from one person to another'" (citing *Gathercole v Smith* (1881) 17 Ch D 1 at 9). As an aside, it is interesting to note that there is something about the name "Glenvar" and dealings in property at an undervalue. Powell J observed at [17] in *Glenvar Vault Capital Ltd (in liq)* (at fn 3) that there appears to be no connection between the two Glenvar companies notwithstanding their similar circumstances.

The transaction was within the specified period. The evidence showed that Glenvar was already insolvent at the date of the transaction and, even if it had not been, it would have become insolvent as a consequence of the transaction. Finally, there was no evidence that Glenvar received any benefit by nominating Foster as purchaser, such as the payment by Foster to Glenvar of the deposit moneys paid by Glenvar, and Foster was, therefore, able to acquire the property for $620,000 rather than the $711,000 specified as the purchase price in the agreement for sale and purchase. That amounted to a transaction at an undervalue and the $91,000 was recoverable by the liquidator from Foster. Judgment was given for that amount plus interest.

The term "transaction" is not defined in the Companies Act, but this judgment illustrates the wide meaning given to the term, at least as used in ss 292 and 297 of the Act.

**Sale of Land** [3.06]
DWMcM

## Caveats

### *Development Construction Co Ltd v Mackenzie*

[2021] NZHC 546

*Caveatable interest — reservation of title clause — Land Transfer Act 2017, ss 138 and 143*

This case holds that, in the absence of a provision conferring upon the supplier of the goods/contractor the right to enter the land and to remove goods which were installed in structures on the land, a reservation of title clause does not give rise to a caveatable interest. It also confirms that, even with such a contractual right of entry/removal, the trend of New Zealand authority is to regard that right as conferring a mere licence, with the result that no caveatable interest in the land is conferred.

#### Facts

Mr Mackenzie employed the applicant (Development Construction Co Ltd or DCL) to carry out earthworks and drainage works on his property. DCL invoiced Mr Mackenzie for the work in the sum of approximately $166,000. Most of this was paid but the sum of nearly $49,000 remained outstanding; Mr Mackenzie contended that the final 30 per

cent of the contract price was only payable upon completion of the final inspection of works and sign-off by various entities, which had not, at that time, been done.

DCL claimed the outstanding monies and lodged a caveat on Mr Mackenzie's title, relying on the reservation of title clause in its terms and conditions of contract and claiming in the caveat that it was "a beneficiary under an implied Trust" (at [1]). Before the Court, however, the claim was that the reservation of title clause conferred upon it an equitable charge over the land (at [15]). This clause stated that (see [11]):

> 7. Ownership of any goods and/or materials supplied by DCL as part of work for the Client shall not pass to the Client until all invoiced amounts owing by the Client in respect of the services and goods and/or materials provided by DCL have been paid in full.

Referring to *Topa Partners Ltd v JWL International Group Ltd* [2020] NZHC 182, (2020) 21 NZCPR 591 and *Carter Holt Harvey Merchandising Group Ltd v Southern Cross Building Society* (1991) 1 NZ ConvC 190,870 (HC), the Court noted (at [18]-[19]) that the trend of authority in New Zealand is that contractual clauses that purport to give contractors the right to enter the land and to remove materials supplied by them is no more than a licence and does not give rise to an interest in land.

Against this backdrop, since the reservation of title clause used by DCL did not confer an express right to enter, it could not create an interest in land. Therefore, DCL did not have a caveatable interest in the property and an order was made for the caveat to be removed.

The Court also responded briefly to the suggestion that a charging order issued under the Construction Contracts Act 2002, or perhaps more accurately the ability to obtain such an order, could confer a caveatable interest. The Court simply noted (at [21]) that the Court of Appeal's decision in *Boat Harbour Holdings Ltd v Steve Mowat Building & Construction Ltd* [2012] NZCA 305, (2013) 13 NZCPR 489 is authority that it does not.

**HMS, Land Law in New Zealand** [10.009]
Dr Toni Collins
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# Co-ownership

## *Robertson v Robertson*

[2020] NZHC 2272

*Order for sale or division — "a statutory jurisdiction to unlock a deadlock" — Property Law Act 2007, ss 339, 342 and 343*

This was an application under s 339 of the Property Law Act 2007 for an order for the sale or the division of property held by two brothers in equal shares as tenants in common. The applicant (Conrad) operated the family boatbuilding business from the property and wanted to expand by constructing new buildings. He sought an order for division. The respondent (Martin) wished to develop the residential potential of the property or sell it at the best price possible in light of its development potential. He opposed the division and sought an order for sale. Both brothers expressed an interest in purchasing the property or part of it.

### Background

The brothers purchased the property in the early 1980s and operated the family boatbuilding business from it. The location of the property was particularly important in that it had access to a river. In 1995, the brothers ended their business partnership. Conrad purchased the business and Martin continued as a boat builder, but from a different location. Conrad's business entered a lease with both brothers as the landlords. The term of the lease expired on 31 December 2007 and, as provided for in the lease, Conrad's business continued to occupy the property on a monthly tenancy paying the then annual rental; the rental paid no longer reflected market rent. Over the years there were numerous discussions between the brothers about how to divide the property and the terms on which they would do so. No resolution was forthcoming and the relationship became strained.

### Issue

Whether it was just and equitable to order a sale of the property or make an order for its division between the brothers?

### The law

The Property Law Act 2007 allows a court to make an order for the sale or division of property under s 339. It must consider the relevant mandatory considerations in s 342 of the Act and can use its further powers under s 343 to support any order made. The Court is required to stand back to assess the "most just and practical way through the impasse before the Court" (*Bayly v Hicks* [2012] NZCA 589, [2013] NZLR 401 at [32]). Under the broad discretionary regime, an order of the Court does not have to reflect the orders sought by the parties.

To decide whether it is more just and equitable to choose an order for sale or an order for division, the Court must assess the justice of the case, in light of all matters relevant to the rights and interests of the parties (*Lake Hayes Property Holdings Ltd v Petherbridge* [2014] NZHC 1673, (2014) 15 NZCPR 590 at [48]). Relevant considerations are, of course, specified in s 342.

### Decision

The Court decided an order for sale was necessary in all the circumstances. The reasons were: first, each brother owned

a half share (see s 342(a)). A division that does not recognise their equal shares is neither fair nor reasonable (*Boyly v Hicks* [2011] NZHC 920, (2011) 13 NZCPR 568 at [39]). The Court dismissed a submission that the aim of any order ought to be maximising the return from the property; in so doing it recognised (at [52]) that there are other valid values such as sentimental or attachment value. In this case there had been a long history of commercial occupation for boatbuilding and separating Conrad's interests as landowner as well as business owner would be an artificial analysis.

Second, regarding the property's nature and location (see s 342(b)), the property was approximately 8.3 ha with a building used for the business and other site improvements. It was zoned residential and in a light industry/boatbuilding precinct. It was also close to Warkworth township which was a developing area with strong demand for residential housing.

Third, regarding the number of co-owners (s 342(c)), here there were two co-owners. In terms of hardship (s 342(d)), any of the division proposals would have some undesired impact on the parties (at [62]). If the property was sold, the parties would also face potential hardship but they had an opportunity to mitigate the risks (at [64] and [65]). There was the potential that neither brother would be successful in their attempt to purchase the property. There was also the potential that only one brother might be successful. If Conrad was unsuccessful, he would have to find another location zoned industrial with water access which might be difficult and there would be relocation costs. Alternatively, if Martin was unsuccessful, he risked the loss of opportunity to undertake a residential development. The Court decided the respondent's hardship did not reach the level of the applicant's.

Fourth, both parties had contributed to the property (see s 342(e)) although Conrad had enjoyed the benefit of rent at lower than commercial rates for 13 years (at [67]).

Section 342(f) directs the court to consider any other matters that it considers to be relevant. On these facts the Court considered that an assessment of the most practical outcome having regard to the brothers was not only relevant but carried more weight than the other factor specified in s 342 (at [68]). The breakdown of the relationship between the brothers had ramifications for their future as productive neighbours in any proposed developments if there was a division. Accordingly, "[a]ny order needs to pragmatically recognise this and the undesirability of forcing an unwanted solution on one or other party unless the requirement of overall fairness clearly demands that" (at [69]). Furthermore, the COVID-19 pandemic had introduced uncertainty into the valuation of the property as evidenced by the significant differences between the expert valuers (at [71]). The Court also noted that a significant issue in this case was the brothers' inability to work together. This was considered to be an insurmountable practical hurdle if there was a division of the property, as they would need to reach agreement on the division, obtain resource consents and resolve issues relating to roading and easements (at [82]).

The Court concluded that division was not a sustainable solution nor the most just and equitable resolution. Instead, the fairest way to resolve the uncertainty was through the marketing and sale of the property. The Court then went on to set out the terms of sale including the date of settlement and the costs to be shared. It also expected the parties to agree on a real estate agent and the outstanding details for sale by auction, which were to be filed in court by way of joint memorandum.

## Comment

The parties put forward numerous proposals to divide the property, which the Court took time to consider. However, each party had legitimate concerns with them, as they all involved disadvantages and hardships. The decisive factor though, was the breakdown of the relationship between the brothers. Despite years of negotiations, the brothers could not design a mutually advantageous proposal for division and this indicated to the Court that division was not a practical option. An order for sale was the just and equitable solution.

An appeal has been dismissed: *Robertson v Robertson* [2021] NZCA 295, the Court of Appeal concluded that the judge had not erred in the exercise of the judicial discretion conferred by s 339.

**HMS, Land Law in New Zealand** [13.021]

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# Easements

## *Parklands Properties Ltd v Auckland Council*

[2020] NZHC 2919

*Application for extinguishment — development company — right of way over developer's land — issues concerning compliance with grounds for extinguishment — exercise of discretion — compensation*

As readers of the Bulletin have seen, the Supreme Court in *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, noted at (2021) 19 BCB 157, thoroughly reviews the exercise of the jurisdiction under s 317 of the Property Law Act 2007 to modify or extinguish an easement or a freehold covenant and removes the more conservative approach to its exercise dating from the early days of its introduction into the law.

*Parklands* is one of the last judgments before the release of that judgment. Though van Bohemen J was aware that *Synlait* was before the Supreme Court, his Honour had to rely on the judgment of the Court of Appeal in that case in *New Zealand Industrial Park Ltd v Stonehill Trustee Ltd* [2019] NZCA 147, (2019) 20 NZCPR 119, noted at (2019) 18 BCB 215. His Honour also recognised (at [119] and [126]) that the Court of Appeal had restated and reaffirmed that the courts have traditionally taken a conservative approach to the exercise of the discretion because an order of modification or extinguishment generally impacts adversely on existing property interests or contractual property rights. Nevertheless, on the present facts his Honour found that there were grounds for extinguishment, that the jurisdiction to extinguish the easement should be exercised, and that an order for the payment of compensation should be made.

The present judgment concerns a right of way and a services easement granted in 2007 between the parties to this proceeding, thereby involving privity of contract. Parklands, the applicant and grantor of the easement now wished to subdivide its land as part of the development of land for housing in greater Auckland and the easements were preventing the full use of Parkland's land. Over the years relations between the parties had soured and agreement could not be reached.

The Court found that, due to change of circumstances, the services easement was not being used, and the right of way, though being used, was unnecessary, there being an "entirely serviceable alternative immediately adjacent to the easement land" (at [93]).

On the facts of the case, the Court held (at [76], [94] and [103]) that the grounds for extinguishment in s 317(1)(a)(i), (ii) and (iii) were all met. The Court then turned to the exercise of the discretion. In the present judgment the Court (at [119]) recorded that in the Court of Appeal judgment in *Stonehill*, Wylie J, delivering the judgment of the Court, had noted the reluctance of the courts to allow contractual property rights to be swept aside in the absence of strong reasons, a factor directly pertinent to the present facts. However, van Bohemen J observed in the present judgment (at [122]) that:

> While the easements are property rights, they are rights conferred for particular purposes. They may provide collateral benefits and negotiating advantage that extends beyond those purposes ... However, in considering whether to exercise the discretion to extinguish, the purposes of the easement and the extent those purposes can be achieved must be a primary consideration.

In the present case, no use was made of the services easement at the time of the application and any future need would be met by a planned extension of a neighbouring road which would occur in conjunction with the applicant's subdivision. The right of way easement was used, but access would be available in the future from the same extension. There would be no loss to the grantees from the extinguishment of the easements. There would therefore be orders for the extinguishment of the easements.

The remaining issue was whether the applicant should pay compensation to the respondent. The jurisdiction to provide payment of compensation to the deprived party was introduced into the Property Law Act 2007 in the context of the provision of easement access to landlocked land. The principles applicable to the measure of the compensation were established in that context and are now also applied to the measure of compensation in the present context.

The principal authority is *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 (CA), which established that compensation should be measured by what a willing buyer and willing seller would arrive at during friendly negotiations. In *Dooley v Sturgess Consulting Ltd* [2016] NZHC 1905, (2016) 18 NZCPR 400 at [15]–[86] Mallon J carried out a detailed analysis of the principles on which compensation will be granted and their application to the facts before her.

These authorities were discussed (at [127]–[179]) and applied (at [180]–[186]) by van Bohemen J in the present case. His Honour considered (at [184]) that a willing buyer and a willing seller would each have expected that the compensation would include the seller's costs associated with the surrender and extinguishment of the easements, and the reasonable buyer would expect to pay a modest sum in recognition of the disruption and inconvenience caused by the development.

On the other hand, the reasonable seller would not expect to receive a sizable portion of the buyer's profits, as claimed by the respondents, because they are both commercial parties who recognise the value of an ongoing cooperative relationship. On that basis the $7,700,400 claimed by the respondents was reduced to $300,000.

**HMS, Land Law in New Zealand** [17.040], [17.043] and

[17.044]
DWMcM

### *Re Stoke Valley Holdings Ltd*

[2020] NZHC 430

*Extinguishment — procedure — originating application — easements redundant — Property Law Act 2007, ss 316 and 317 — High Court Rules 2016, r 19.5*

In this short judgment of 13 paras an order was made granting leave to bring the application by way of an originating application under r 19.5 of the High Court Rules 2016, and also granting the orders sought extinguishing three registered easements over the land in question.

The land was in the process of subdivision when these applications, under ss 316 and 317 of the Property Law Act 2007, were made. The easements registered over the land prevented the vesting of land for road and reserve purposes as required by the resource consent for the subdivision.

Affidavit evidence was filed establishing that the easements were, in practical terms, redundant and now merely prevented the progress of the subdivision. However, there were a number of titles which held the benefit of the easements and there was evidence before the Court that there would be substantial difficulty in obtaining consent from the large number of relevant parties.

The Nelson City Council also filed evidence that the Council consented to the extinguishment of the easements and that their extinguishment would not prejudice or harm the interest of any benefitted party as there was separate appropriate infrastructure in place which provided the services contained within the easement grants.

As authority in respect of the application to use the originating application procedure, Grice J referred to the earlier decision of the High Court in *Application by Spring Grove Land Ltd* [2016] NZHC 2109, (2016) 18 NZCPR 212, noted in (2017) 17 BCB 379a. Further such decisions are noted at (2018) 18 BCB 94 and (2020) 19 BCB 38.

Her Honour was also satisfied on the evidence that the easements could be extinguished under s 317 of the Property Law Act 2007 as they were now redundant and, with one exception, there was no detriment to any party holding the benefit of the easements. One benefitted landowner did retain a practical benefit of an easement in question, but that party was also an applicant in this proceeding and both parties had deposed that there was a satisfactory private agreement between them. This was accepted as consent by that party to the extinguishment of the easement.

As to the exact ground detailed in the Property Law Act 2007 and relied upon by the applicant, Grice J was satisfied that the continuation in force of the relevant easements would impede the reasonable use of the land in a different way or to a different extent to that which could reasonably have been foreseen by the original parties to the easements at the time of their creation (s 317(1)(a)(i)).

**HMS, Land Law in New Zealand** [16.097] and [17.040]
DWMcM

## Freehold covenants

### *Re Brow (as trustees of the Oratia Trust)*

[2021] NZHC 304

*Application for extinguishment — lost easement instrument — draft instrument of the covenant still available along with accompanying file memorandum*

This may well be the first judgment to be issued after the release of the judgment of the Supreme Court in *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, (2020) NZCPR 672 noted at (2021) 19 BCB 157. In this case the application was made in reliance on s 317(1)(d) and (f) of the Property Law Act 2007. Paragraph (d) gives the court jurisdiction if the proposed modification or extinguishment will not substantially injure any person entitled and para (f) gives jurisdiction if, for any other reason than those in earlier paras, it is just and equitable to modify or extinguish the covenant wholly or partly.

Cooke J accepted (at [15]) that, on the evidence, the grounds to make the orders sought were made out. Firstly, as to the exercise of the discretion, because no-one was able to identify exactly what the restrictions in the covenant were, his Honour considered it appropriate that the restrictions ought to be removed (at [16]):

> It is not appropriate for there to be an unclear restriction by way of a covenant listed on the title when it is not possible to identify what it is.

Secondly, the draft covenants were largely directed at controlling steps that would be taken in association with the original formation of a subdivision in 1979 and were, therefore, no longer of any relevance.

Finally, to the extent that the draft covenants had any remaining relevance, they had effectively been superseded by other provisions in the Kāpiti Coast District Plan.

Only one issue remained. One draft covenant related to fencing between the property and any public reserve. The parties had had discussions with the local Kāpiti Coast District Council, agreeing to a similar limitation to be included in a substitute covenant to be notified on the title in place of the instrument which could no longer be found. An order was made accordingly.

**HMS, Land Law in New Zealand** [17.042] and [17.045]
DWMcM

# Landlord and tenant

## *Zhou and Sang v Pacific Pearl Accommodation Ltd*

[2020] NZHC 3133

*Tenant seeking permission of landlord to assignment of lease — landlord serving a s 246 PLA notice upon the tenant claiming breaches of the lease and then issuing proceedings to cancel the lease — notice failing to adequately define all the breaches complained of in the proceeding and some alleged breaches postdating the notice — costs the landlord can properly charge to the tenant on consideration of request for consent to assignment — discussion as to how far non-compliance by tenant with Council requirements will amount to a breach of the lease — Property Law Act 2007, ss 243, 246 and 253*

### Background

Pacific Pearl Accommodation Ltd (the tenant) leased former hospital premises from which it conducted a boarding house business. In 2014, the applicants (the landlord) entered into an agreement to purchase the premises with the lease already in place. During its due diligence process the landlord discovered that a Code Compliance Certificate (CCC) relating to alterations which the tenant had carried out to the premises had not been completed. The tenant undertook to complete the CCC and the sale proceeded. The landlord became the registered owner in 2015.

During 2016 and 2017, the parties were involved in a dispute over rent which the landlord claimed was owing. This dispute was settled by agreement and the agreement was recorded in a Deed (the Deed of Settlement), the relevant part of which read (at [25]): "The parties have agreed to settle any and all claims that they have against the other on the terms and conditions of this deed."

In May 2017, the tenant was granted conditional resource consent to increase the occupancy of the premises from 45 to 100 people.

In 2019, the tenant applied for the landlord's consent to assign the lease to a proposed purchaser of the boarding house business. In the course of investigations by the proposed purchaser/assignee, it transpired that the tenant was still to obtain the CCC. The landlord notified the tenant that it would give consent on the basis that the CCC was finalised and that the tenant amended its use of the premises to comply with Council regulatory requirements. In response the tenant claimed that the landlord was not entitled to impose such conditions.

On 30 September 2019, the landlord then served a notice on the tenant pursuant to s 246 of the Property Law Act 2007 (PLA) stating that the tenant had breached the terms of the lease by failing to (at [43]):

> (a) Pay the Trust's costs in considering the request to assign the Lease; and
>
> (b) Comply with all statutes, ordinances, regulations and by-laws relating to the use of the property as required by cl 21.1 of the lease.

The PLA notice then called upon the tenant to remedy the breaches by (at [74]):

- payment of the costs; and
- carrying out the necessary works to remediate the compliance issues identified by the Auckland Council during a site visit on 20 September 2019 including, but not limited to, the unauthorised alteration and extension of the sprinkler system.

Later, on 2 October 2019, the Council gave notice to the landlord that it wished to carry out an inspection of the property. In turn, on 7 October 2019, the landlord forwarded the notice to the tenant and gave notice on its own behalf that it would be present to inspect the property. On the day of the inspection the tenant's site manager denied access to both the Council and the landlord, advising that the tenant's sole director and shareholder was at the hospital and wanted to be present. Later the tenant explained that it was concerned that the landlord might take advantage of the opportunity to effect a re-entry and thereby terminate the lease (at [49]-[50]).

Some weeks later the premises were inspected by the Council, which reported that the Building Warrant of Fitness (BWOF) for the premises was now revoked for a number of reasons and that because the tenant had filed to keep required records it would not be possible to issue a BWOF for 2020. The reasons included false claims regarding (at [55]):

- test and maintenance records;
- the number of current residents exceeding the permitted number;
- unconsented "tiny houses" on the premises; and
- evidence that there were normally a number of caravans on the property.

The inspection also led to a fire and safety report advising that the premises was unsafe for occupation due to fire safety concerns (at [58]).

The landlord then issued these proceedings, seeking orders for cancellation of the lease and possession of the premises.

### The proceedings

In its application for cancellation and possession, the landlord alleged the following specific breaches of the lease (at [60]):

> (1) failure to obtain within a reasonable time a CCC for works carried out on the premises, being a breach of an implied term of the lease;
>
> (2) operating the boarding house in breach of the Consent;

(3) overcrowding the property and illegal, noxious and offensive use of it;

(4) obtaining a BWOF under false pretences and operating in breach of the BWOF;

(5) refusing to pay the landlord's legal costs; and

(6) refusal to allow inspection by the landlord.

The tenant filed a notice of opposition claiming that the PLA notice had not sufficiently identified how the alleged concerns were breaches of the lease and specifically denying each of the alleged breaches. It also claimed that the Deed of Settlement estopped the landlord from pursuing the proceedings and sought relief against cancellation if the breaches were proved.

## The lease

The lease contained the following relevant provisions (at [8]):

- Clause 21.1 provided:

  > The Tenant shall comply with the provisions of all statutes, ordinances, regulations and by-laws relating to the use of the premises by the Tenant or any other occupant and will also comply with the provisions of all licences requisitions and notices issued by any competent authority in respect of the premises or their use by the Tenant or other occupant ...

- Clause 22.1 provided:

  > The Tenant shall not:
  >
  > ...
  >
  > (c) Use the premises or allow them to be used for any noisome noxious illegal or offensive trade or business.

- Clause 33.1 provided:

  > The Tenant shall not assign sublet or otherwise part with the possession of the premises ... without first obtaining the written consent of the Landlord which the Landlord shall not unreasonably withhold or delay if the following conditions are fulfilled:
  >
  > ...
  >
  > (e) The Tenant pays the Landlord's reasonable costs and disbursements in respect of the approval and the preparation of any deed of covenant or guarantee and (if appropriate) all fees and charges payable in respect of any reasonable inquiries made by or on behalf of the Landlord concerning any proposed assignee subtenant or guarantor. All such costs shall be payable whether or not the assignment or subletting proceeds.

- Clause 37.1 provided:

  > The Tenant will during the term permit the Landlord ... to have access to inspect the premises provided that:
  >
  > (a) Any such inspection shall be at a time which is reasonably convenient to the Tenant after reasonable written notice.
  >
  > (b) The inspection is conducted in a manner which does not cause disruption to the Tenant.
  >
  > ...

## Reasoning

Section 246 of the PLA requires that a notice of intention to cancel a lease must adequately inform the tenant of three things (at [70]):

(a) The nature and extent of the breach complained about [by the landlord];

(b) The steps to be taken to remedy the breach if the lessor considers the breach can be remedied; and

(c) The fact that the lessor may cancel the lease if the breach is not remedied at the expiry of a period that is reasonable in the circumstances.

The Court's findings can be summarised as follows:

(1) *Was the landlord estopped from pursuing its claims in respect of those breaches by the Deed of Settlement?*

The Deed of Settlement did not preclude the landlord's claims because all those claims arose after the Deed was signed. Admittedly, the landlord had written to the tenant prior to execution of the Deed requiring it to finalise the CCC, and the tenant had not complied, but the landlord did not follow this up until after execution of the Deed, so the dispute over the CCC could not be said to have "crystallised" until then (at [84]).

(2) *Did the PLA notice adequately detail the breaches alleged by the landlord and of the action required by the tenant to remedy them?*

It will be recalled that the PLA notice purported to refer to two separate breaches — the first was the failure to pay the landlord's legal costs. The Court concluded (at [75]) that this did satisfy the requirements of s 246(2) as it exactly described the alleged breach and the required remedy. The second "breach" was the failure to "comply with all statutes, ordinances, regulations and by-laws relating to the use of the property as required by cl 21.1 of the Lease". The Court concluded (at [76]) that this did not satisfy the requirements of s 246(2); it did not refer to any particular breach and did not therefore properly inform the tenant of the basis of the landlord's complaint and what was needed by way of remedy. As a result, the tenant had only received valid notice of the alleged failure to pay the landlord's costs.

(3) *Did the tenant commit a breach of the lease by failing to complete the CCC within a reasonable time?*

The Court concluded that the lease was already in place when the landlord purchased the premises and the tenant's undertaking to finalise the CCC was

made in the context of the agreement for sale and purchase, not the lease. It was therefore not a breach of the lease (at [90]). In any event, it was not specified in the PLA notice and could not be relied on for cancellation purposes (at [85]).

(4) *Did the tenant breach the lease by increasing the number of occupants of the premises beyond the maximum allowable under the Consent?*

While the PLA notice did not specifically refer to the Consent, the Court concluded that there was an implied mention of it in the reference to "remediating compliance issues" (at [90]). At the date of service of the PLA notice, however, the tenant was not in breach because the latest communication from the Council at that time concerning the Resource Consent was a letter confirming that the tenant had fully complied with it (at [91]).

(5) *Had the tenant breached the lease by overcrowding the property and using it in an illegal, noisome or noxious manner?*

The Court did not enquire into the factual background of this allegation but observed that the obligation not to use the property in these ways is set out in cl 22.19(c) of the lease and the PLA notice referred only to cl 21 and made no mention of such alleged misuse (at [94] and [95]).

(6) *Had the tenant breached the lease by obtaining a BWOF under false pretences?*

As the original BWOF had not been cancelled at the time the PLA notice was served, the Court concluded that this allegation could not be relied on in the application for cancellation of the lease (at [96]). Additionally, the Court considered that the Building Act 2004 imposes the obligation to obtain a BWOF on the owner, not the tenant. In taking the responsibility on itself, the tenant was acting as agent for the landlord and any failure did not constitute a breach of the lease (at [97] and [98]).

(7) *Had the tenant breached the lease by failing to pay the landlord's legal costs?*

The tenant was found to be in breach but, on examination, not all of the costs which the landlord had sought to pass on to the tenant were in fact payable by it. The Court concluded that the only costs which the tenant was obliged to pay were those reasonably payable relating to the landlord's approval of the proposed assignment of lease, including any reasonable enquiries by it concerning the proposed assignee. A significant proportion of the landlord's claimed costs related to enquiries concerning the tenant's compliance with the lease, with the CCC requirements, the Consent, and with other Council requirements. The tenant's liability was therefore found to be reduced from the original claim for $8,850.10 to $5,747 (at [99]–[109]).

(8) *Had the tenant breached the lease by denying the landlord access to the property?*

This was held to constitute breach of the lease but one that did not justify cancellation because it took place after the PLA notice was served and was not referred to in the notice (at [111]).

## Decision

The applications for cancellation of lease and possession of the land were dismissed on the grounds that:

- apart from the failure to pay the landlord's costs, the PLA notice did not give sufficient detail of the alleged breaches upon which the landlord relied;
- any failure to duly complete the CCC or the BWOF did not constitute breaches of the lease;
- any breach of the Consent came into being after the PLA notice was served; and
- the failure to pay the costs was not sufficiently serious to justify cancellation of the lease and, even if the lease were cancelled, the Court would grant relief.

Costs were awarded against the landlord.

## Comment

A very clear message in this judgment is that a PLA notice under s 246:

- must spell out exactly the breaches alleged by the landlord and exactly what actions are required of the tenant in order to remedy those breaches; and
- cannot be used as a basis for cancellation for breaches that occurred after the notice was served.

The landlord here went astray, firstly by being vague in its description of the breaches, other than the non-payment of costs, and secondly by trying to include in its proceedings breaches that did not exist at the time the PLA notice was served.

The Court's finding that any failure on the tenant's part to obtain a BWOF would not be a breach of the lease because the PLA places that responsibility on the landlord is interesting. The lease, as is typical, clearly purported to charge the tenant with observing Council by-laws in the course of its activities and the tenant had taken responsibility on itself for obtaining the BWOF and had allegedly misled the Council in the process. Many landlords might be surprised to hear that no breach of the lease was involved in these circumstances.

Similarly, the Court's approach relating to what costs the landlord is entitled to charge in the context of a request for consent to assignment might cause some surprise. The wording in the lease provides that the tenant will pay all costs "in respect of the approval". In deciding whether to approve, the landlord is entitled to consider whether or not the tenant was in breach of the lease in any respect and any resulting costs would be payable by the tenant.

This is a relatively complex judgment but worth reading, particularly in that it illustrates the problems a landlord can trigger by not issuing a properly drawn s 246 notice.

**HMS, Land Law in New Zealand** [11.237]

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