



**BELL GULLY**

# Property Update

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**Tom Bennett**

PARTNER



**Jane Holland**

PARTNER



**Hugh Kettle**

PARTNER



**Andrew Petersen**

PARTNER

## Welcome to the May 2008 edition of Bell Gully's Property publication

Changes brought about by an overhaul of property law have prompted reform and readjustment in New Zealand's property sector.

In this edition we continue to follow the changes implemented by the Property Law Act 2007. Senior associate Sally Whincop focuses on issues for landlord and tenant relating to insurance cover, while senior associate Susan Bright considers the new regime for cancelling a lease under the Act. We also bring you the latest developments in legislation and news from the courts.

We hope you find these articles of value and we look forward to receiving your feedback and suggestions for future editions. Please feel free to contact us, other members of the team listed in this update, or publication editor Nichola Flaherty at [nichola.flaherty@bellgully.com](mailto:nichola.flaherty@bellgully.com).

Best regards

Tom Bennett, Jane Holland, Andrew Petersen and Hugh Kettle

Partners



**Susan Bright**  
SENIOR ASSOCIATE

“landlords must now give notice before re-entering and cancelling the lease for non-payment of rent.”

## CANCELLING A LEASE - WHAT'S CHANGED FOR LANDLORDS?

By Susan Bright

There is a new regime for landlords wanting to exercise their powers of re-entry under a lease, or forfeit a lease.

Under the Property Law Act 2007 (the Act) the term “forfeiture” has been replaced with the word “cancellation”. The notice requirements on cancellation have been significantly changed and landlords must now give notice before re-entering and cancelling the lease for non-payment of rent.

There are two methods to cancel a lease:

- by application to the court for an order for possession; or
- by peaceable re-entry onto the premises.

However, prior to taking the above steps, the appropriate notices must be served.

### Notice requirements for cancellation

The Act continues to draw a distinction between cancellation for non-payment of rent and cancellation for breaches of other covenants. The procedure however, particularly in relation to the exercise of re-entry for non-payment of rent, has changed.

#### NON-PAYMENT OF RENT

Cancellation is effected only if:

- rent is at least 10 working days in arrears; and
- the landlord has given the tenant notice of its consequent intent to cancel the lease should the rent not be paid within the specified period in the notice (which cannot be less than 10 working days after the date the notice is served).

A landlord may give notice of their intention to cancel the lease as soon as there is a default, but may not re-enter the premises until at least 10 working days after the notice has been served. This is possible because the minimum 10-day period of notice for paying the arrears may run at the same time as the minimum 10-day period for which the rent must be in arrears.

Therefore it would be prudent for a landlord to give notice as soon as possible after the default so that the landlord can exercise its right to re-enter and cancel the lease at the earliest opportunity.

#### BREACH OF OTHER COVENANTS

Cancellation is effected only if:

- the landlord has given the tenant notice of its consequent intent to cancel the lease; and
- the breach is not remedied by the date given in the notice (which must be reasonable in the circumstances, depending on the breach and what action is required in order to remedy the breach).

## NOTICE REQUIREMENTS

For notices to cancel the lease, either for non-payment of rent or breach of other covenants, the notice must:

- inform the tenant of the nature and extent of the breach;
- outline what must be done to remedy it;
- advise the tenant of the landlord's intention to cancel the lease if the breach is not remedied within the specified timeframe;
- notify the tenant of their right to apply to court for relief against cancellation; and
- advise the tenant to seek legal advice.

For breach of other covenants, the landlord may, and can, require compensation for an amount considered reasonable in the circumstances, either in lieu of the tenant remedying the breach or where a breach is incapable of remedy.

It is necessary to give notice to each tenant individually as well as to each guarantor.

Further, the landlord must give notice to any mortgagee or receiver, any sublessee, and to any mortgagee or receiver of the sublessee where these parties are known to the landlord.

While the failure to notify these parties will not invalidate the notice, it will potentially enable these parties to seek an extension of time to remedy the breach. All these parties also have the right to apply for relief.

## THE LAST STRAW - POSSESSION OR RE-ENTRY

If the rental arrears specified in the notice are not paid or the breach is not remedied and/or compensation paid (if applicable) within the specified time period, the landlord may apply to court for possession of the property.

Alternatively, the landlord can re-enter and cancel the lease, however another notice must be served to effect this. The re-entry must be undertaken peaceably and in accordance with Section 91 of the Crimes Act 1961 (i.e. not by forcible entry and detainer where the premises are actually being possessed and peaceably occupied by another). It is advisable that re-entry should take place outside business hours when the premises are empty (but within daylight hours).

### PRACTICAL STEPS OF RE-ENTRY:

- (a) Serve required notices.
- (b) Choose an appropriate time to minimise conflict (re-entry must be peaceable). Re-entry should be done during the day (between 6am-9pm).
- (c) Take a locksmith, re-enter and change locks to secure premises and a security guard (if you think the situation warrants it) to keep you and the premises secure.
- (d) Take inventory of the landlord and tenant's fittings and chattels.
- (e) Remove tenant's fittings and chattels to a safe and secure place as the landlord becomes a bailee for the tenant. Alternatively, arrange a suitable time with the tenant to allow them to enter the premises and remove such fittings and chattels.

Please contact us if you require any further information.



**Sally Whincop**  
SENIOR ASSOCIATE

## NEW TENANT-FRIENDLY LAW LIMITS LIABILITY

The Property Law Act 2007 (the Act) has altered and clarified the rights and liabilities of landlords and tenants relating to insurance cover. The new, tenant-friendly legislation places limits on the rights and powers of landlords, particularly around insurance payments and recovery for costs of damage to a property.

Under a commercial lease, the landlord commonly insures the premises and pays a proportion of the premium, usually through the operating expenses for the property. In the past, the landlord's insurer could step into the shoes of the landlord and recover the loss directly from the tenant in respect of the damaged premises, even if the tenant had paid the insurance costs. The reforms now prevent the landlord or its insurer from bringing any action against the tenant for destruction to the property, except in certain limited circumstances.

### Reforms and their implications

The new provisions of the Act, which took effect on 1 January 2008, mean that a tenant is not liable for any costs resulting from destruction caused by certain risks, provided that the damage was not intentionally caused by the tenant, or was not the result of a criminal act/omission, or an act/omission which renders the insurance monies irrecoverable. These risks are destruction caused by the following, and occurring after 1 January 2008, regardless of the date of the lease:

- fire
- flood
- explosion
- lightening
- storms
- earthquakes and volcanic activity; and
- any other insured risks

This means that the landlord cannot require the tenant to meet the cost of repair, nor can the tenant be compelled to indemnify the landlord against such costs or be required to pay damages in respect of any destruction caused by such risks. This exclusion of liability also applies where the destruction or damage has occurred as a result of the tenant's negligence.

### Reasons for inclusion of specific risks – less room for error or dispute

Prior legislation left it up to the landlord to determine what risks insurance cover would extend to under a commercial lease. This meant that there was a greater likelihood of error and dispute where a lease was not drafted clearly. The new Act eliminates the likelihood of error by specifying these seven risks. It is important that these seven risks are listed in the lease from the outset to avoid any further doubt as to when the insurance provisions are invoked. Landlords may also choose to specify further additional risks in the lease, if their insurance policies apply to these.

## **How does this affect an application for insurance cover in higher-risk zones?**

The nature and location of the premises will obviously impact on the practicability of an application for insurance cover for the risks specified under the new provisions. Specific reference to earthquakes and volcanic activity under the current Act will have significant implications for some landlords. Landlords who own properties located in earthquake prone zones or areas where there is a history of increased volcanic activity may have more difficulty obtaining insurance cover for such risks. Landlords are advised to reassess their insurance policies and check the cost of excess on such risks.

## **Opt outs and rights retained by landlords under the new Act**

Landlords can contract out of the new provisions and call upon the tenant to meet the cost of any damage or destruction resulting from one of the specified risks, provided there is an express statement in the lease to this effect. This option is only effective where a landlord is not covered, or fully covered, under an insurance policy for one of the specified risks when the destruction occurs and the tenant has acknowledged this. One area where this may apply is in relation to insurance excesses, where a landlord may require a tenant to pay the insurance excess in the event of a claim brought about by the tenant's breach of the lease or negligent act. Conversely, where the tenant is under an obligation to insure the premises for certain risks, it is recommended that the landlord ask for a copy of the tenant's insurance policy and request that they be noted as a joint party under the insurance policy to ensure that cover has actually been obtained.

Landlords are also entitled to terminate a lease where the destruction or damage to the leased premises is caused or contributed to by the tenant's negligence and subsequently affects the landlord's ability to obtain insurance. In such circumstances, the landlord may also recover any increased insurance costs from a tenant, including any increased premium or excess in respect of future claims for damage of a similar nature.

The Act does not affect the right of the landlord, if expressly provided for in the lease, to end a lease immediately where total destruction of the property has occurred, rendering the premises untenable.

Please contact us if you require any further information on these issues.

## WHAT'S NEW IN LEGISLATION?

### Updates on previously noted legislation

#### Building Amendment Bill

The Building Amendment Bill 2007 received Royal Assent on 14th March 2008 is now the Building Amendment Act 2008 (the Act).

Those sections of the Act relating to applications for restricted building work, and the requirement that the restricted building work must be carried out or supervised by a licensed building practitioner, will now apply as from 30 November 2010 (previously 2009).

The Act also requires project information memoranda to include a reminder about access provisions for disabled persons.

#### Overseas Investment – New Designation and Delegation Letter

A new Designation and Delegation Letter was issued on 12 December 2007 that may help streamline the application process for overseas investment.

It delegates wider powers and more scope to grant consents to the Overseas Investment Office in relation to decisions involving land. The delegation of matters involving overseas investment in significant business assets remains the same. The new delegation will hopefully make the application process more efficient as fewer applications will need to go to the Ministers for consideration.

#### Real Estate Agents Bill

The Real Estate Agents bill will replace the Real Estate Agents Act 1976. The bill proposes putting an end to self regulation of the industry by abolishing the Real Estate Agents Licensing Board and creating a Real Estate Agents Authority, independent of the industry, to oversee licensing, complaints, disciplinary and enforcement processes.

The bill creates a Disciplinary Tribunal (to deal with serious cases) which will have the ability to order the cancellation of licences and award compensation. It also establishes a public register of real estate agents and sales people that records any breaches of the industry standards against the names of those involved, as well as introducing a fit and proper person test for people entering the industry.

The Justice and Electoral Select Committee have recently heard a number of submissions on the bill. Particular areas of concern for the Committee include the discrepancy between New Zealand and Australian qualification standards, the inclusion of the property management sector, funding for the new scheme and the inadequacy of the bill's transitional arrangement: the bill is set to come into force the day after it receives Royal Assent, yet there will be no time to get the machinery of the new regime in place. The Committee has undertaken to investigate some of the concerns raised further, with a report due back on 10 June 2008.

#### Affordable Housing: Enabling Territorial Authorities Bill

The bill enables territorial authorities to assess the level of affordable housing in their districts. Following its assessment, a territorial authority may, if it wishes to, develop an affordable housing policy and implement that policy. The bill provides for full public participation in the development of affordable housing policies, including rights of objection and appeal.

Before a territorial authority can implement an affordable housing policy, it must (among other things):

- undertake a housing needs assessment that identifies the level and type of need in its district;
- develop, in consultation with its community:
  - an affordable housing policy that sets out the outcomes and objectives that a territorial authority wants to achieve via its affordable housing policy;

## **The Property Law (Mortgagees' Sales Forms and Fees) Regulations 2007**

These regulations came into force on 1 January 2008 and are made under the Property Law Act 2007. They prescribe forms and fees relating to mortgagees' sales.

- the criteria for determining developments to which the affordable housing policy will apply; and
- what actions a developer may be required to do to facilitate the provision of affordable housing.

The bill also addresses the use of restrictive covenants whose principal purpose is to stop the provision of affordable housing or social housing, such as housing for people on low incomes or housing for people who need supported accommodation. The bill would prevent the imposition of such covenants from the date the bill comes into force, but would not affect existing covenants.

## **Land Transfer Amendment Regulations 2008 (SR2008/015)**

These regulations, which came into force on 31 March 2008, amend the Land Transfer Regulations 2002 to implement Landonline release 3.0 of the programme expansion of electronic lodgements.

The ultimate aim of the expansion is to apply electronic lodgement to all instruments that may be lodged by conveyancers.

## **From the Department of Housing and Building**

### **CONSULTATION ON THE FENCING OF SWIMMING POOLS ACT 1987**

The Department of Building and Housing is currently reviewing the Fencing of Swimming Pools Act 1987 to ensure it is operating as effectively as possible. The first round of consultation runs to 30 June 2008, and seeks feedback on issues that have been raised by stakeholders.

A copy of the discussion document can be downloaded from: [www.dbh.govt.nz/fospa-consultation](http://www.dbh.govt.nz/fospa-consultation) with responses to comments@dbh.govt.nz

### **BUILDING (INFRINGEMENT OFFENCES, FEES AND FORMS) REGULATIONS 2007**

These were enacted on 17 December 2007 but do not come into force until 1 July 2008.

They specify the offences under the Building Act 2004 which may be dealt with as infringement offences. The regulations also prescribe forms for infringement notices and infringement reminder notices.

## WHAT'S NEW IN THE COURTS?

### Option to purchase: ensure legal documentation reflects parties' intentions

“parties to an option to purchase must be clear from the outset exactly when the option has to be exercised.”

The recent case of *Fresh Cut Ltd* highlights that parties to an option to purchase must ensure that they fully understand the steps required to properly exercise the option and also must be clear from the outset exactly when the option has to be exercised.

In this case, the option to purchase the freehold was exercisable on written notice by the tenant by the “option date” which was “two years after the signing of this lease or upon the termination of the lease, whichever is the earlier.”

The lease was for an initial term of six months, expiring on 18 October 2003, with rights of renewal. The tenant never formally renewed the lease (only indicated that it intended to renew), but remained in possession under a holding over clause in the lease. The parties did enter into further discussions but a new deed of lease was never signed.

The tenant then sought to exercise the option to purchase the property (still within the two year period). However the landlord refused on the basis that the option date had already passed. Both parties agreed that an option to purchase does not ordinarily survive the expiry of the lease, but the tenant argued that the holding over clause meant that the lease was not terminated on expiry of the initial six-month term because holding over represents a continuation of the landlord and tenant relationship.

The High Court disagreed – the holding over clause and the monthly tenancy it created was a new relationship between the landlord and tenant which began when the six-month lease expired. The option therefore terminated on 18 October 2003 due to the failure of the tenant to formally renew the lease.

### Relying on assurances

The case of *Juzwa v Hill* is a reminder that despite the written terms of a contract a representation or assurance made and then relied upon by a party to enter into a contract, may be enforced by the court, even though it is not a term of the contract.

Mr Juzwa and Ms Rabinska entered into an agreement for the sale of their property to the Hills. The agreement stated the purchase price of the property would be paid by an initial deposit, followed by two six-monthly instalments of the purchase price. There was a proviso that if full payment and settlement had not occurred by 31 December 2003, the agreement was deemed to have been cancelled.

After the agreement was drawn up, but before it was signed, Mr Juzwa assured the Hills that he and Ms Rabinska would not insist on payment of the final instalment by a particular date. By 31 December 2003, the final instalment had not been paid and settlement had not occurred.

The sellers attempted to sell the property to another person, and the Hills sued for specific performance. The Court of Appeal found in favour of the Hills, upholding the decision of the trial judge, that the representation as to flexibility of payment had been made, that the buyers had relied upon that assurance and that it was reasonable for them to do so. The court commented on the informal environment that existed between the parties, such that there was no need to alter the wording of the contractual document. The document had

been prepared and was in the parties' hands, although unsigned, when the assurance was given. That assurance was clearly of pivotal importance to the Hills when they subsequently signed the agreement.

The Court of Appeal held that the assurance was not to be viewed as a variation of the agreement and the fact that it was not in writing and signed by the parties was therefore immaterial. The case was decided on the basis of estoppel - the principle that when a person makes a promise or gives a representation causing another person to act relying on the promise, then it would be unconscionable for the person who made the promise to go back on it. In this case, estoppel operated to enforce the promise made by the sellers, even though it was not a term of the contract. The sellers were ordered to perform the agreement and transfer the property to the Hills.

## USEFUL WEBSITES

### New Zealand Government

- Department of Building and Housing [\[www.dbh.govt.nz\]](http://www.dbh.govt.nz)
- Local Government online (for details of local councils and websites) [\[www.localgovt.co.nz\]](http://www.localgovt.co.nz)
- Landonline [\[www.landonline.govt.nz\]](http://www.landonline.govt.nz)
- Inland Revenue Department [\[www.ird.govt.nz\]](http://www.ird.govt.nz)
- Ministry of Economic Development [\[www.med.govt.nz\]](http://www.med.govt.nz)
- NZ Government [\[www.govt.nz\]](http://www.govt.nz) [\[www.beehive.govt.nz\]](http://www.beehive.govt.nz)
- Occupational Health and Safety, Department of Labour [\[www.osh.govt.nz\]](http://www.osh.govt.nz)
- The Companies Office [\[www.companies.govt.nz\]](http://www.companies.govt.nz)
- Overseas Investment Office [\[www.oio.linz.govt.nz\]](http://www.oio.linz.govt.nz)
- Personal Property Securities Register [\[www.ppsr.govt.nz\]](http://www.ppsr.govt.nz)
- [Standards New Zealand \[www.standards.co.nz\]](http://www.standards.co.nz)

### Australian commercial

- Green Building Council of Australia [\[www.gbcaus.org\]](http://www.gbcaus.org)
- Property Council of Australia [\[www.propertyoz.com.au\]](http://www.propertyoz.com.au)
- Real Estate Institute of Australia [\[www.reiaustralia.com.au\]](http://www.reiaustralia.com.au)

### New Zealand commercial

- BRANZ Limited [\[www.branz.co.nz\]](http://www.branz.co.nz)
- Building Officials Institute of New Zealand Inc [\[www.boinz.org.nz\]](http://www.boinz.org.nz)
- Construction Industry Council [\[www.nzcic.co.nz\]](http://www.nzcic.co.nz)
- New Zealand Business Council for Sustainable Development [\[www.nzbcsd.org.nz\]](http://www.nzbcsd.org.nz)
- New Zealand Green Building Council [\[www.nzgbc.org.nz\]](http://www.nzgbc.org.nz)
- Institute of Professional Engineers [\[www.ipenz.org.nz\]](http://www.ipenz.org.nz)
- Insurance Council of New Zealand [\[www.icnz.org.nz\]](http://www.icnz.org.nz)
- New Zealand Fire Service [\[www.fire.org.nz\]](http://www.fire.org.nz)
- New Zealand Institute of Management [\[www.nzim.net.nz\]](http://www.nzim.net.nz)
- Property Council of New Zealand [\[www.propertynz.co.nz\]](http://www.propertynz.co.nz)
- Property Institute of New Zealand [\[www.property.org.nz\]](http://www.property.org.nz)
- QV Insider [\[www.qvinsider.co.nz\]](http://www.qvinsider.co.nz)
- Real Estate Institute of New Zealand [\[www.reinz.org.nz\]](http://www.reinz.org.nz)
- New Zealand Institute of Economic Research [\[www.nzier.org.nz\]](http://www.nzier.org.nz)

## CONTACTS

**David McGregor**

SENIOR PARTNER

DDI 64 9 916 8920

*david.mcgregor@bellgully.com*

**Tom Bennett**

PARTNER

DDI 64 9 916 8789

*tom.bennett@bellgully.com*

**Jane Holland**

PARTNER

DDI 64 9 916 8983

*jane.holland@bellgully.com*

**Hugh Kettle**

PARTNER

DDI 64 4 915 6929

*hugh.kettle@bellgully.com*

**Andrew Petersen**

PARTNER

DDI 64 9 916 8622

*andrew.petersen@bellgully.com*

**Marija Batistich**

SENIOR ASSOCIATE

DDI 64 9 916 8809

*marija.batistich@bellgully.com*

**Susan Bright**

SENIOR ASSOCIATE

DDI 64 9 916 8862

*susan.bright@bellgully.com*

**Davida Dunphy**

SENIOR ASSOCIATE

DDI 64 9 916 8818

*davida.dunphy@bellgully.com*

**Josh McBride**

SENIOR ASSOCIATE

DDI 64 9 916 8831

*josh.mcbride@bellgully.com*

**Maree Stenberg**

SENIOR ASSOCIATE

DDI 64 9 916 8846

*maree.stenberg@bellgully.com*

**Sally Whincop**

SENIOR ASSOCIATE

DDI 64 9 916 8716

*sally.whincop@bellgully.com*

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**AUCKLAND** VERO CENTRE, 48 SHORTLAND STREET  
PO BOX 4199, AUCKLAND 1140, NEW ZEALAND, DX CP20509  
TEL 64 9 916 8800 FAX 64 9 916 8801

**WELLINGTON** HP TOWER, 171 FEATHERSTON STREET  
PO BOX 1291, WELLINGTON 6140, NEW ZEALAND, DX SX11164  
TEL 64 4 915 6800 FAX 64 4 915 6810

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