# Commercial Property

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Bell Gully

Mark Crosbie

## Welcome to the first edition of Bell Gully's new regular commercial property publication.

This update is designed to provide you with an overview of current legal developments and issues that are likely to affect businesses and individuals operating in and around the commercial property industry.

Written by lawyers with particular expertise in their subjects, the articles are designed to provide a "heads-up" of key topics, rather than a comprehensive legal summary.

In this issue we look at:

- the debate between landlords and tenants over repairs versus replacement
- soil contamination and legal responsibilities
- developments in overseas investment regulation; and
- key decisions from the courts and legislators which affect the industry.

We welcome your feedback, as well as input on key issues that you would like us to cover in future updates. Please feel free to contact me, other members of the team listed in this update, or publication editor Catherine Trengrove at *catherine.trengrove@bellgully.com*.

Best regards

**Mark Crosbie**
Partner

# The blurred line between repairs and replacements: who pays?

Bell Gully

**BY JANE HOLLAND**

The courts are frequently critical of leases which are silent or unclear on who is responsible for the repair and replacement of items. This area has always been confusing and court decisions sometimes appear contradictory, simply because each lease form and set of facts is so unique. Trying to establish general principles is often difficult.

The easiest case to start with is where the lease does not give any responsibility at all to either the landlord or the tenant to do the particular work to the premises. This can arise if the work is "fair wear and tear" and so excluded from the tenant's responsibility or if, for example, the work is a renewal of an item rather than a repair.

In some limited cases, the courts have been prepared to imply a repair obligation on the landlord, in order to give the lease "business efficacy" or as a corollary to the tenant's maintenance or repair obligations[1]. But last year, in the Avondale[2] case, the courts refused to "fill in the gaps" where the lease was silent on whose responsibility it was to renew landlord's fixtures and fittings that had worn out.

The court criticised this oversight and pointed out that the lease had 24 rights of renewal, which should have made the parties address the issue. It refused to imply any obligations on either party to replace the fixtures and fittings which were essential to the tenant's use of the property as a hotel. We understand that the tenant ended up paying for the repairs and replacements so it could continue operating its hotel business from the premises.

Where there are repair obligations stated in the lease (but renewal is not dealt with), the question of what actually is a repair as opposed to replacement has received a lot of court comment. The only reliable guideline is that each case is a question of fact and degree. These are some very general statements which may give some guidance:

- renewal or replacement of defective parts is a repair;
- replacement of something already there with a modern equivalent is a repair;
- replacement of substantially the whole is a replacement; and
- providing something new is a replacement.

These principles must be considered against two other factors: the condition of the premises at the start of the term of the lease and the wording of the repair clause itself. All standard form leases used in New Zealand measure a tenant's repair obligations against the condition of the premises at the commencement of the lease term.

Sometimes tenants think that a landlord's failure to repair is a breach of the landlord's quiet enjoyment covenant under the lease. Whilst this could be the case in respect of repairs, the extent of the landlord's obligation to provide the tenant with quiet enjoyment of the premises will not operate so as to impose additional repair obligations on the landlord.

A party may also have a statutory obligation to repair premises. When a child fell down a lift shaft of a Wellington building in 2006[3], the building owner was fined under the Building Act. The definition of the leased area was critical in establishing who had "control" of the lift shaft area and who had to keep the area safe. If the definition of the premises had been different, the tenant may have been charged instead.

Clear drafting of parties' repair obligations is essential. It is particularly important to deal with who will replace items that wear out during a longer term lease.

- The courts will no longer "fill in the gaps" where the lease is silent.
- Repairs and replacements are a question of fact and degree.
- The definition of the leased areas also affects who has statutory obligations to repair.
- Clear drafting of parties' repair obligations is essential. It is particularly important to deal with who will replace items that wear out during a longer term lease.

1 *Lee v Leeds City Council (2202) EWCA CIV 6 (21 June 2002)*

2 *Avondale Hotel No. 1 Limited v Portage Licensing Trust (CA 142/04, Auckland, 10 August 2005)*

3 *79 Manners Street Limited v Maurice Kevin Rohloff (2006) BCL 184*

# Contaminated sites:
## who enforces a clean up and how?

Bell Gully

**BY THERESA LE BAS**

Contaminated sites continue to make regular news headlines. The issues involved can be complex and often controversial. Here we look at who enforces environmental law requirements for contaminated sites.

Contamination of soil and groundwater is traditionally associated with industrial land but the growing trend to redevelop brownfield sites once used for business to residential use is placing the issue of contaminated site management on the radar screen.

The starting point is the Resource Management Act (RMA), which defines a contaminant. A gas, liquid, solid or micro-organism, energy or heat substance once discharged must change, or have the potential to change, the receiving environment before it falls within the statutory definition of a contaminant. It is the fact of change or potential change which is critical - not necessarily the level of change.

### Once a site is contaminated, who identifies it and who enforces its clean up?

Unlike Australia, and New South Wales in particular, there is no compulsory reporting duty on landowners or occupiers who know about or suspect the presence of a contaminant on, in or under their land. An obligation only arises under the RMA when an owner applies to redevelop or change the use of the land (and needs a resource consent to do so) or when contaminants from that land affect the neighbouring environment. In most cases, contamination is only discovered when either a purchaser or vendor undertakes an environmental audit prior to the sale or purchase of the land.

Regional and district councils encourage voluntary contaminated site management through their regional policy statements, regional plans and district plans. The councils frequently refer to the Ministry for the Environment's guidelines, including the Hazardous Activities and Industries List (HAIL), to assist in developing policies, objectives and rules to manage contaminated sites.

### What if your land is contaminated by previous owners or lessees?

Historical activities may often have been lawful in their day, but are now frowned upon. For example, some waste disposal practices acceptable in the 1960s are not considered so today. The RMA allows councils to issue abatement notices or enforcement orders against current owners and occupiers of land, even if neither was responsible for the original contamination. These parties can consider joining with previous owners or occupiers to share or apportion responsibility for any subsequent clean-up.

One way to find out if land may be contaminated is when the council tags property records, including Land Information Report (LIM reports). Last year, a number of councils within the Auckland region started issuing LIM reports with contaminated site tags on those properties which, in decades gone by, had been used as market gardens and orchards. The Minister for the Environment intervened and requested the removal of the tags when it was discovered that the councils had acted upon inconclusive research.

### Rules when leasing

From a leasing perspective, tenants (as occupiers of land) are generally not permitted under the lease to contaminate the premises. If a tenant is authorised to use premises for a business activity which might contaminate a site (for example, the tenant has a resource consent to undertake a business activity which is listed on the Ministry for the Environment's HAIL list), who should later be responsible for any clean-up? Should a tenant have to do the clean-up because the landlord wishes to change the use/redevelop the site? Another tricky issue for landlords and tenants is who will clean up contamination not caused by the tenant. Councils can choose to take action against either the landlord (as owner) or the tenant (as occupier). If the council chooses to pursue the tenant, the tenant should ensure that under the terms of its lease, it can require the landlord to do the clean-up.

Contamination of soil and/or groundwater, and who is to pay for its clean up, used to be a topic restricted to industrial properties. However, the combination of increasing awareness of contamination caused by historical activities and the pressure on land resources resulting in changes of land use have forced this issue to be more carefully assessed in a much wider context.

- There is no compulsory duty on landowners and occupiers to report contamination unless redeveloping/changing use of the land or contamination affects neighbours.
- Previous owners and landlords/tenants can be required to share responsibility for clean-up.

# The Overseas Investment Act – one year on

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**BY ANDREW PETERSEN**

Over a year has passed since the Overseas Investment Act 2005 came into force. It has become apparent during this time that the 2005 Act is having a greater impact on transactions involving overseas investment in "sensitive" land in New Zealand. Who would have thought an overseas person wishing to buy an apartment on Auckland's Princes Wharf would need consent? We look at a few of the current issues that both overseas investors and New Zealand vendors should be aware of when dealing with sensitive land.

## Complex and lengthy process

As a result of the additional requirements of the 2005 Act, the consent process has become much longer, both in terms of preparing an application and the consideration of an application by the OIO and government ministers. The 2005 Act contains extensive criteria for consent for overseas investments in sensitive land. There are also a wide range of factors that must be considered for assessing the benefit of overseas investments in sensitive land. A considerable amount of information is required to be included in any application to enable those factors to be fully considered.

Sensitive land applications can take two or more weeks to prepare, depending on the complexity of the sensitive land interests involved. Applicants should then allow for a further two to three month period for the application to be reviewed and a decision made, depending on whether or not ministers have to be involved. The time period may be further extended if your application is incomplete, as an application will not be considered until all relevant information has been provided in support of an application.

## New Zealanders can have obligations too

A common misconception is that the overseas investment regime does not apply to New Zealand persons. A New Zealand person can be subject to the requirements in the Overseas Investment Regulations 2005 if the land to be sold to an overseas person includes any foreshore, seabed, riverbed or lakebed (known as "special land"). A common situation where this can apply is the sale of land which has a river running through it. If the riverbed is not already vested in the Crown, then the owner of the land must offer the riverbed to the Crown before consent can be given to the sale of the land.

The special land offer back process can be time consuming and involves the giving of notices and undertaking a survey and valuation of the special land. Because consent cannot be given until the offer has been made to the Crown, settlement of a transaction involving special land can be significantly delayed. One practical solution to this issue has been for the seller to offer any special land to the Crown for no consideration. This has allowed the consent process to proceed without the offer back process having to be formally completed.

**Some other scenarios to be aware of:**

The 2005 Act now extends to a wider range of land transactions than was previously the case under the 1973 regime.

One scenario has arisen in the context of commercial office leases of premises located in heritage buildings. When considering whether a commercial office lease of a heritage building exceeds the 4,000m2 threshold required for the land to be sensitive, OIO takes the view that the entire area of the lessee's premises in a building should be calculated, rather than the area of the land on which the building is located. Overseas persons will need to bear this in mind when looking at leases of large commercial office space involving heritage sites.

The Act's reach has also now extended to the sale of apartments located on Princes Wharf in Auckland due to their location over the Waitemata seabed. A sale of any estate or interest in residential or office space on Princes Wharf to an overseas person will require consent no matter how small the area in question. This can add a level of complexity to an otherwise straightforward residential apartment sale.

The Overseas Investment Act has had a significant impact on transactions involving overseas investment in sensitive New Zealand assets. This has led to longer settlement periods for certain transactions while statutory processes are worked through and increased costs for overseas persons investing in New Zealand. Both vendors and purchasers of sensitive New Zealand assets need to be aware of the requirements of the Act and the timing involved in an application. It is vital that both vendors and purchasers have advice to ensure the process is managed as efficiently as possible.

- Allow 2+ weeks to prepare a sensitive land application.
- Allow 2-3 months for OIO review and decision.
- New Zealanders selling land to overseas buyers may have to "offer back" special land to the Crown before OIO consent can be given.
- Overseas residents leasing commercial office space involving heritage sites may need OIO consent.
- Overseas buyers of residential or office space on Princes Wharf will need OIO consent.

# What's new from the courts?

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## "No caveat" clauses - still need for care

The recent Landco case[1] drew a sigh of relief from most developers and lawyers when, on appeal, a purchaser's registration of a caveat was refused where the agreement for sale and purchase contained a clause prohibiting the purchaser from registering a caveat on the title (a "no caveat" clause).

There had previously been much discussion as to whether "no caveat" clauses were unenforceable as a matter of public policy. It had been held by a the lower court that the right to caveat was of a public nature and a "no caveat" clause unacceptably prevented that public right. On appeal however, the Court of Appeal refused to accept this argument and the caveat was removed.

But commentators have since pointed out that the general principles regarding caveats have not been altered and in fact could still allow a caveat to be sustained despite a document containing a "no caveat " clause. The removal or sustaining of caveats is based on whether the caveator has reasonably arguable grounds to support the caveat. The presence of a "no caveat" clause does not affect the court's first assessment of these grounds. If there are reasonable grounds for a caveat, the breach of a "no caveat" clause is only relevant to the court's decision whether to exercise its limited discretion to remove the caveat.

Vendors and purchasers still need to understand that the effect of "no caveat" clauses in agreements may not be what they intend.

*1 Landco Albany v Fu Hao Construction Limited (CA 179/04, 30 November 2005)*

## Postdating of sale and purchase agreements

Many people do not consider documents binding on them until they are dated. But the presence or absence of dates or even postdating is only one factor the court takes into account when considering at what point legally binding relationships are created.

The recent unreported Court of Appeal judgment in the Robinson case[2] is a timely reminder about dating of agreements and the rules of offer and acceptance when signing agreements for sale and purchase of property.

The Court of Appeal held that the vendor's postdating of a signed agreement did not give the vendor the right to withdraw prior to the date being inserted in the agreement. The agreement was a binding agreement when the vendor returned the fully signed agreement to the agent. The purchaser was granted a court order forcing the vendor's sale to him of the property.

The rules of offer and acceptance can be more complicated than would be anticipated in some circumstances. Legal advice should be sought before any arrangement to postdate an agreement is entered into.

*2 Robinson v Hemachandra Holdings (NZ) Limited (CA 152/05, 17 May 2006)*

## Settlement payment and notification issues

Settlement payments and the timing of notification of settlement are two issues revisited in the Rick Dees case[3].

In this case, the court held that the purchaser was legally able to settle by electronic funds transfer (under the agreement for sale and purchase) even though the vendor's solicitors had faxed their settlement requirements for funds to be deposited by way of bank cheque.

The purchaser was also able to fax notification of payment at 5.07pm where the contract specified settlement and notification to be received by 5pm. The vendor was unable to cancel the contract (as he tried to do) by fax to the purchaser sent at 5.03pm.

The court held that under the terms of the agreement, the purchaser was able to change the method of payment and was allowed to give notice of that payment after the time limit specified in the agreement.

A vendor seeking to cancel a contract by strictly following the notice time restrictions must now allow a "reasonable time" following payment. If you wish to have funds paid by one method only (e.g. direct bank account deposit), the vendor has to make clear that this is the only acceptable way to pay.

The obvious difficulty is where the vendor is selling and buying on the same day. To be sure that the vendor receives the funds and is notified in time, the vendor now needs to make very clear the form of payment and the time restrictions for notification on the sale transaction.

*3 Rick Dees Limited v Larsen (CA 82/05, 31 March 2006)*

## No unit title subdivisions of sub-lessee interests

Financiers, developers and purchasers/owners should reassess carefully the legality of unit titled sublease interests as a result of the NZPS case[4].

Despite the potentially drastic commercial impact of this decision, the court held that the framework of the Unit Titles Act 1972 does not contemplate subdivision of sublease interests in land. The court also decided that the Act does not allow unit titles to be created where the lease is a combination of a current lease and a future lease.

The court acknowledged the potentially drastic commercial consequences of this decision, given that several sublease unit title developments have already been completed. The court also noted that NZPS submitted that it would not be possible to develop the land in any other commercially viable way. This decision has been appealed.

This case may be the basis for claims to the Land Registrar for compensation under the Land Transfer Act where sublease unit titles have already been consented to by the Registrar General of Land. Any claims will have to be carefully researched and considered.

As the court acknowledged, large areas of Albany land are structured in this layered lease manner. The development opportunities of this land are now under serious threat if the developers cannot give a registrable and secure interest in the land to end purchasers. Banks with security over this type of lease structure will most certainly be reviewing their positions.

It is important to note that the decision does not affect:

- the ability of lessees to subdivide a parcel of land into unit titles under the Act; or
- the subdivision of land by way of the grant at the same time of a chain of subleases - i.e. the "layered leases" which are common in a number of developments; or
- the ability of parties to create a succession of leasehold interests (such as a second lease to take effect on the expiration of the first lease). This case only challenges the ability of parties to subdivide both current and future leasehold interests.

4 *NZPS Investments Limited v Registrar General of Land (CIV 2005-404-6920 [9 June 2006])*

## New additional standard clauses in deeds of lease

The Auckland District Law Society has released a one page insertion for its ADLS Deed of Lease 4th Edition 2002 updating references to the old Building Act 1991 in the lease.

It also provides some additional clauses specifically addressing the provisions of Section 363 of the Building Act 2004 which deal with the carrying out of building work in a building that is open to the public. We will be inserting these clauses as standard practice from now on. If you need to discuss these changes for your own lease documentation, please contact Jane Holland at *jane.holland@bellgully.com*.

## New PCNZ Guide for the Measurement of Rentable Areas (revised August 2006)

PCNZ has just replaced the April 2006 guide (green cover) with the August 2006 version (blue cover). The majority of changes are in increased labelling on diagrams, renumbering of diagrams and consequential internal cross-referencing. We understand that the updated version has been sent to those recorded by PCNZ as having received the April edition.

# What’s new in legislation?

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## From the Department of Housing and Building

The Department of Housing and Building has launched a **review of the Building Code** – the first review of the standards for building compliance since the code was introduced in 1991.

The review is scheduled to be completed by November 2007, with the new code to take effect in 2008. The updated Building Code will be setting new standards for new buildings and also for the change of use of buildings and alterations to existing buildings. A copy of the Discussion Document is available at the department’s website: *http://www.building.govt.nz/publish/codreview.php.*

The department is also reviewing 11 of the Compliance Documents to ensure the documentation is simple and in line with the Building Code. Submissions on the changes are open until 6 October 2006. The proposed changes to the technical aspects of the standards and compliance documents are available at the department’s website: *http://www.dbh.govt.nz/UserFiles/File/Consulting/pdf/2006/proposed-changes-to-compliance-documents.pdf.*

The Minister for Building Issues has also announced the **new categories of Licensed Building Practitioners**. The licensing regime and categories of licenses are set out in the Building Act 2004. The terms of registration within those licence categories are keenly awaited in the industry. These new licensed practitioners will be needed for those working in design and building i.e. for builders and designers, engineers and architects, when there is a new building or for an existing building, a change of use, extension to the floor area, extension of the life of the building or subdivision of the building. Licensing is to be phased in between November 2007 and November 2011. There will be a separate licensing system developed for Independent Qualified Persons to inspect and maintain the annual warrant of fitness for buildings. This is still being developed by the department. We will update you on these issues when further details come to hand. Current information is available at: *http://www.building.govt.nz/publish/bplicensing.php.*

The department is also reviewing the **Unit Titles Act 1972**. The original Discussion Document was published in November 2004 and there was public consultation until March 2005. From this, a Summary of Submissions was produced and most recently the Options for Change were released. Minister of Building Issues Clayton Cosgrove said he was impressed by the high standard of public submissions. The next step is draft legislation. Information to date is available at: *http://www.dbh.govt.nz/unit-titles-review/introduction.html.*

For those with interests in **retirement villages**, the department has released regulations setting out the new disputes resolution procedure under the Retirement Villages Act 2003. The new procedures apply from 1 October 2006. Members of the Disputes Panel under the Act will be appointed before that date. Visit *http://www.dbh.govt.nz/retirement-villages for more information.*

Finally, the department has just announced it is scaling back its public consultation of the Building Act itself and now intends any review to be in 2007 or later. This allows more time for the Act to settle in. Instead there will be a narrower range of technical or minor changes to the Act some time in 2007. We shall of course, keep you advised of these when they are released.

## Leaky building measures

The Minister for Building Issues released two new measures for dealing with leaky buildings.

New legislation was introduced to Parliament on 23 August 2006 and was originally intended to be in place by the beginning of next year. The Minister has now accelerated this timeframe to the end of this year. The Weathertight Resolution Services Amendment Bill will mean:

- councils must include information on leaky buildings on LIM reports;
- claims will be heard by a Weathertight Homes Tribunal, a new panel being set up under the Department of Justice to avoid any conflict between the department’s advisers, who currently both advise on and also then adjudicate claims;
- new lower voting thresholds for making a class action easier in apartment buildings; and
- shorter time limits for mediation.

We will keep you advised once legislation is finalised.

Along with the new legislation, the Minister also released a new guideline booklet for buildings (and homes) on 25 August 2006 titled **“External moisture - An introduction to weathertightness design principles”.** The new booklet is aimed at builders, building officials, developers and financiers. It explains the principles of weathertightness design. It is not a compliance document but does give general guidance to the building industry. The booklet is free and can be downloaded from the department’s website: *http://www.dbh.govt.nz/pub-building-weathertight-home#external.*

## Building consent time limits and council procedures

A bill proposing to force councils to give building consents for free if they do not meet the time limits under the Building Act 2004 went before Parliament on October 11.

It has been referred to the Local Government and Environment Select Committee for review. We shall keep you advised of its progress.

On another tack, the Government announced on 12 October that it is funding councils with $3 million over the next three years to improve the councils' own internal consent processes. **"Proposals to set Building Consent Authority Accreditation Fees and Assistance with Accreditation"** states the money will be spent on developing resources for councils to meet the accreditation standards and criteria as set out in the Building Act 2004. This would include workshops, training and other support services.

The aim is to get the councils' standards and procedures for consents to improve in both quality and time. The proposals are open for submission until 20 November. Visit *www.dbh.govt.nz* for more details and a copy of the proposals consultation document.

## Shop trading hours up for review

Shop trading hours for Anzac Day, Good Friday and Easter Sunday are up for review. There are two new bills before Parliament dealing with the issue.

One proposes only allowing shops in tourist areas to open on Good Friday and Easter Sunday and the other proposes allowing local councils to decide the hours of trading for Anzac Day and the Easter holidays.

We shall keep you informed of any resulting legislation.

## Pool fencing review

Those with pools or thinking of installing pools or spas should be aware of the current government review of pool fencing standards. The Fencing and Swimming Pool Act 1987 and the Building Code currently set the standards for swimming pool fencing. Both Acts are now administered by the Department of Housing and Building. A copy of the draft proposal is available by contacting *vicki.allison@standards.co.nz.*

# Useful website links

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## New Zealand Government

**Department of Building and Housing**
*www.dbh.govt.nz*

**Local Government online**
(for details of local councils and websites)
*www.localgovt.co.nz*

**Landonline**
*www.landonline.govt.nz*

**Inland Revenue Department**
*www.ird.govt.nz*

**Ministry of Economic Development**
*www.med.govt.nz*

**NZ Government**
*www.govt.nz* and *www.beehive.govt.nz*

**Occupational Health and Safety, Department of Labour**
*www.osh.govt.nz*

## New Zealand organisations

**The Companies Office**
*www.companies.govt.nz*

**Overseas Investment Office**
*www.oio.linz.govt.nz*

**Personal Property Securities Register**
*www.ppsr.govt.nz*

**Standards New Zealand**
*www.standards.co.nz*

## New Zealand commercial

**BRANZ Limited**
*www.branz.co.nz*

**Building Officials Institute of New Zealand Inc**
*www.boinz.org.nz*

**Construction Industry Council**
*www.nzcic.co.nz*

**New Zealand Business Council for Sustainable Development**
*www.nzbcsd.org.nz*

**New Zealand Green Building Council**
*www.nzgbc.org.nz*

**Institute of Professional Engineers**
*www.ipenz.org.nz*

**Insurance Council of New Zealand**
*www.icnz.org.nz*

**New Zealand Fire Service**
*www.fire.org.nz*

**New Zealand Institute of Management**
*www.nzim.net.nz*

**Property Council of New Zealand**
*www.propertynz.co.nz*

**Property Institute of New Zealand**
*www.property.org.nz*

**Real Estate Institute of New Zealand**
*www.reinz.org.nz*

**New Zealand Institute of Economic Research**
*www.nzier.org.nz*

## Australian commercial sites

**Green Building Council of Australia**
*www.gbcaus.org*

**Property Council of Australia**
*www.propertyoz.com.au*

**Real Estate Institute of Australia**
*www.reiaustralia.com*

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