PROPERTY LAW NEWS

OCTOBER 2019

WELCOME

to Issue No. 3 of Property Law News, Bell Gully's monthly digest on regulatory developments, together with cases and news of interest in the **real estate** and **projects (construction)** sectors.

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Need more information?
The Property Law News is a monthly digest on regulatory developments, together with cases and news of interest in the real estate and projects (construction) sectors.

For more information, please contact Sonia Ng, your usual Bell Gully contact, or visit our website.

CASE NOTES

✱ REAL ESTATE

Exercising cancellation rights correctly under Sale and Purchase Agreements
Strack v Grey [2019] NZCA 432

The Court of Appeal has released a judgement reminding parties that, before they cancel an agreement for non-fulfilment of a condition, they must ensure that they have "*done all things reasonably necessary*" to fulfil any conditions that were inserted for their benefit.

Key points: *Strack v Grey* is a cautionary judgement on how to exercise cancellation rights correctly under a sale and purchase agreement for a property. Some key points that emerged from the judgement include:

- The reminder that under the standard Auckland District Law Society (**ADLS**) form of sale and purchase agreement, a party "*must do all things reasonably necessary*" to fulfil any conditions that were inserted for their benefit.
- Although what is reasonably necessary depends on the circumstances, in the context of a finance condition, which is ordinarily inserted solely for the purchaser's benefit, the purchaser may have an obligation to approach more than one lender, seek a solicitor's advice about alternative sources of finance, and approach the vendors for finance.
- It is the purchaser who must prove, on the balance of probabilities, that they have done all things reasonably necessary to fulfil the finance condition, if a question is raised as to this aspect. This is because usually only the purchaser and their agents would have information on what steps were taken to obtain finance.
- A purchaser's eligibility to borrow is ordinarily provable on the balance of probabilities because, amongst other reasons, the lending criteria for financial institutions at any given time are known, and property offered as security has a value that can be estimated objectively by lenders.
- If the purchaser cannot prove on the balance of probabilities that they have done all things reasonably necessary to obtain a finance offer, then they may run into issues attempting to cancel the agreement based on non-fulfilment of the finance condition.
- On an ancillary point, to cancel based on the building report condition under the standard ADLS agreement requires that the purchaser must first have obtained a building report that meets the standard required under clause 10.3 of that agreement. This requires the report be in written form, and prepared on an objective assessment by a suitably qualified building inspector in accordance with accepted principles and methods. If the building report obtained by the purchaser does not meet these requirements, they may also encounter issues cancelling based on non-fulfilment of the building report condition.

Relevant facts of the case: The Purchaser had agreed to buy a property from the Vendors for $1.2 million, conditional on finance and a building report. Two days after signing the agreement, the Purchaser purported to cancel it due to certain building features of the property. He never had a written building

report prepared. His concerns and eventual decision to cancel were based on remarks by a valuer and from his own research. Before purporting to cancel, he also made preliminary enquiries with his bank for finance, but no loan application was ever made.

The Vendors resold the property at a loss and sued the Purchaser for the difference.

In the High Court, the judge found the Purchaser was in breach of contract because he never obtained a written building report. However, the judge found the Vendors would have suffered only minimal loss because the Purchaser would have failed to satisfy the finance condition anyway, as his "*prospects of obtaining finance were so remote so as to be negligible*". The High Court judge characterised this as a lost chance case, where the Purchaser must pay an amount proportionate to the likelihood that he could have fulfilled the finance condition. Having determined that the Purchaser had no realistic prospect of obtaining finance, the judge ordered him to pay nominal damages of $100 to the Vendors.

The Vendors appealed the High Court's award of $100 nominal damages. The Vendors succeeded, with the Court of Appeal disagreeing that this was a lost chance case. The Court of Appeal reasoned that a lost chance case should only be characterised as such where the outcome depended on a third party's decision, and the third party's decision is unknowable.

For a finance condition, the outcome depends on the lender's decision and the Court of Appeal considered that a lender's decision is not unknowable since, amongst other things, financial institutions' lending criteria is known at any given time. In this case, the Purchaser's lender never prepared a loan application. In the Court of Appeal's view, it was far from clear that the Purchaser would have been refused finance had the application been prepared. There was also insufficient evidence that the Purchaser approached other lenders, and what those other lenders may be prepared to lend. Furthermore, there was evidence that the Vendors were open to providing finance to the Purchaser.

Under these circumstances, the Court of Appeal found the Purchaser had not proved on the balance of probabilities that he did all things reasonably necessary to fulfil the finance condition. He was ordered to pay $150,000 to the Vendors, being the difference between the contract price and the resale price.

Bell Gully's expertise involves advising on the sale and purchase of real estate. We can help in drafting conditions to suit your needs and advise on validly exercising cancellation rights. Please feel free to contact one of our property lawyers if you need any assistance.

Does tenant's emailed response constitute acceptance of lease?
Banbrook v Tan Che Hoe & Sons (Pte) Ltd [2019] NZHC 1415

In summary: A lease is a formal legal arrangement and is usually evidenced by the parties (the landlord, the tenant and where applicable, the tenant's guarantor) signing a formal Deed of Lease.

In practice, however, sometimes the Deed of Lease isn't signed by all the parties, and neither party considers this to be a big issue until a dispute arises and one party tries to argue that the lease is not enforceable, because it was never validly entered into.

This case is an example of such a situation. The Tenant was a former barrister who leased premises from the Landlord. When the lease was about to expire, the Tenant and the Landlord agreed that his lease would be extended for another three years to 30 November 2017, but with a reduction in the floor area of the premises.

The Tenant's acceptance of these terms was conveyed by email. The email contained his full letterhead and contact particulars. The email acknowledged the Landlord's previous correspondence confirming the lease extension and partial surrender of premises. The Tenant in his email also advised that he "confirmed the changes outlined in that email are accepted by [him]".

Five months later, the Landlord's property manager forwarded to the Tenant a Deed of Partial Surrender and Extension of Lease. The Tenant never signed this Deed.

By early 2017, the Tenant had fallen behind in his lease commitments. The Landlord sought summary judgement for outstanding rent and operating expenses through to 30 November 2017. The Tenant opposed by relying on, amongst other grounds:

- that he had never executed the Deed of Partial Surrender and Extension, and
- "as there was no lease in place", he was a monthly tenant, and did not commit himself to a lease extension to 30 November 2017.

Unsurprisingly, both the District Court and the High Court opined that there was a valid lease extension by virtue of the emailed exchanges between the Landlord and the Tenant. The exchange constituted an agreement for partial surrender and extension. The relevant terms were set out with sufficient certainty.

To the extent that the Tenant's signature was needed for the lease extension to be enforceable, the court confirmed that this requirement can be taken as met by the Tenant's email. The requirements for a valid electronic signature are set out in the Contract and Commercial Law Act 2017. The Tenant's email was on his letterhead, and was clear and unequivocal in its acceptance of the Landlord's proposals. There was no question that the email came from the Tenant's email address and concluded with his sign-off. Based on these factors, the court concluded that this email included a valid electronic signature.

The Landlord's case was also supported by the fact that although the Tenant never signed the Deed of Partial Surrender and Extension, the Tenant continued to occupy the premises in accordance with the agreement he had reached with the Landlord and the terms of the draft Deed.

The takeaways: We always recommend that formal legal arrangements, such as leases or any associated variation, renewal or surrender of such leases, be evidenced by a formal legal document (this would commonly be by way of a Deed) that is validly executed by all relevant parties. This would minimize the chance of one party alleging the arrangement is unenforceable because the relevant formal document was never signed, as was what happened in this case.

If the formal legal documentation was never signed, it is possible for the court to still uphold the arrangement, although you likely do not want to go through court proceedings to prove the point. As this case demonstrates, the court is more likely to uphold a legal arrangement in these circumstances if:

- where emailed correspondence is involved, the email meets the requirements of a valid electronic signature under the Contract and Commercial Law Act 2017. This requires that the email must be reliable as an electronic signature (for example, if it can be reliably discerned that the email was sent from the sender and not from someone else purporting to be the sender) and must adequately identify the signatory and indicate the signatory's approval of the information to which the signature relates, or

- there was some element of part performance of the arrangement by the relevant parties. That is, even though the formal documentation was never signed by all the parties, they nevertheless proceeded to behave and act in a way consistent with the agreed arrangement.

Bell Gully regularly advises landlords and tenants on all aspects of commercial leasing matters. Please contact one of our property lawyers if you have an issue that requires attention, and we would be happy to assist.

PROJECTS (CONSTRUCTION)

"Reasonable endeavours" to do something – how far do you have to go?
Focus Construction Interiors Ltd v Spaceworks Design Group Ltd [2019] NZHC 2211

In Summary: Focus was a company specialising in interior fitout construction and project management services. Spaceworks was a commercial interior design company. The two companies had a history of working together whereby Focus would be recommended to do the build element of interior fitouts. The work was said to be of a negotiated nature, where only Focus was asked to provide a quote.

The relationship began to break down in 2008, with referral work having diminished. Following a mediation, the parties executed a settlement agreement which involved, relevantly, that "*Spaceworks shall make reasonable endeavours, acting in good faith, to refer work to Focus having a total gross value of $3 million (excluding GST), it being anticipated that this can be achieved over a period of four years from the date of this agreement*".

Focus claimed that Spaceworks failed to make the required reasonable endeavours to refer work.

Based on the evidence and the wording of the agreement, the High Court was satisfied that Spaceworks did make the required reasonable endeavours. Some relevant comments discerned from the judgement included:

- the confirmation that a "best endeavours" or "reasonable endeavours" clause will be enforceable if the objective, and the steps needed to be taken to attain it, can be prescribed by the court. This may be possible if the contractual obligations were of relative simplicity and predictability.
- However, if the steps needed to attain the objective cannot be prescribed, certainty of objective may be sufficient to render the obligation enforceable.
- A "reasonable endeavours" obligation usually does not require the obligor to sacrifice their own commercial interests, unless the contract specifies that certain steps have to be taken.
- A "reasonable endeavours" obligation can be contrasted with an "all reasonable endeavours" or "best endeavours" one, in that where several reasonable courses of action are available to achieve the desired outcome or objective, a "reasonable endeavours" obligation only requires the obligor to take one reasonable course, not all of them. A "reasonable endeavours" obligation is less stringent than a "best endeavours" obligation.

Practical points: "Endeavours" clauses may be useful to denote the level of effort a party has to put in to achieve an obligation. But in practical terms, when these matters end up in court, whether a party has discharged the obligation will always be fact-specific.

Drafting tips to reduce uncertainty include stating the objective clearly, and where applicable, consider stating any steps or actions required to satisfy the obligation. The clause may be drafted with reference to industry guidelines or standards. Alternatively, the clause may cap the amount of expenditure the obligor is obliged to expend to satisfy the obligation.

Regardless of how it is drafted, it is recommended to avoid using untested wording such as "utmost endeavours". "Commercially reasonable endeavours" is also not tested, although the English case law has considered a similar "all reasonable but commercially prudent endeavours" as requiring the obligor to go on trying until all reasonable endeavours have been exhausted, but in doing so, the obligor is allowed to consider its own commercial interests and is not obliged to make a commercial sacrifice that is detrimental to its commercial interests.

Bell Gully has lawyers with specialist experience in construction law and procurement projects. Please feel free to contact one of our team if you need assistance with a construction law related matter.

REGULATORY UPDATES

✱ REAL ESTATE

IRD reviews rules on taxing land sales

The IRD released a tax policy consultation document, "Habitual buying and selling of land", as it has identified concerns that the current restrictions are not working as intended.

The current rules means that taxpayers are not taxed on the sale of their main home, residence or business premises, except when they have a "regular pattern" of buying and selling land used for these purposes.

However, the current rules allows taxpayers to circumvent them under certain situations. The consultation document highlighted the example of someone buying and selling land using different but associated persons or entities. For example, Mr A may buy and sell the first property, which is used as the family home. Mrs A will buy and sell the second property, which is again used as the family home. The A Family Trust will buy and sell the third property, again used as the family home, and so on.

The consultation document proposes to amend the current rules to capture a person, or group of people and entities in these circumstances. The land must be used as a main home, residence, or business premises by the person or group of people, or the person or group of people that controls the entity that owns the premises.

The consultation document also includes other proposed amendments to ensure taxpayers cannot structure around the rules on habitual buying and selling of land. Submissions on the document closed on 18 October 2019. Ministers are expected to make decisions on this issue in late 2019.

Click here for the IRD's media release.

Revenue Minister clarifies land use payments are taxable

The Revenue Minister Stuart Nash announced his intention to introduce a legislative amendment to ensure payments from the grant of a land right (such as a licence or a limited term easement) paid to a landowner continue to be taxable.

"Payments for the grant of a land right were always intended to be taxable income under current legislation. However doubts have been raised on the clarity of the legislation on this point. We want to eliminate any doubt", said Mr Nash.

The amendment is included in the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Bill, which is currently being considered by the select committee. If passed in its proposed form, the amendment will apply retrospectively to all land use payments received from 1 April 2013, with a savings provision to protect taxpayers who have already filed a tax return or received a binding ruling from the IRD that the payments were not taxable.

Click here for the IRD's media release.

Kāinga Ora – Homes and Communities established

Kāinga Ora – Homes and Communities is a new Crown entity established on 1 October 2019 to replace Housing New Zealand, its subsidiary HLC Limited, and the KiwiBuild unit. The entity's key roles are to be a public housing landlord, and work with the Ministry of Housing and Urban Development to facilitate and deliver housing and urban development projects.

Later this year, the Urban Development Bill will be introduced to give *Kāinga Ora* access to a range of existing development powers that are currently spread across multiple statutes and agencies. The public will have opportunities to make submissions on the bill when it reaches the select committee stage.

Click here for the Ministry of Housing and Urban Development's media release.

PROJECTS (CONSTRUCTION)

Government announces next steps for building law reforms

In an effort to improve the quality of building work and deliver fairer outcomes when things go wrong, the Government released proposals for significant reforms to New Zealand's building laws in April this year. Public consultation on the proposals closed in June. A total of 470 submissions were received.

After considering the submissions received, the Government has announced that the changes it has agreed to include:

- **Streamlining consenting process for prefabrication and off-site manufacturing –** A manufacturer certification scheme is proposed so that a building consent is only needed for the installation of a prefabricated home. This means a second consent won't be required for the design or factory work, thereby reducing duplicated effort for manufacturers and building consent authorities.
- **Prescribed building product information must be publicly available –** Manufacturers and suppliers will be required to make a minimum level of information publicly available about the building products they sell. These will include installation and maintenance information. MBIE is working with stakeholders to finalise the information requirements that will be set in the regulations.
- **Reducing the building levy –** The building levy will be reduced from $2.01 to $1.75 (including GST) per $1,000 of consented building work above a threshold of $20,444 (including GST). The scope of the levy will also be widened to allow MBIE to spend it on activities related to the broader stewardship of the construction sector, such as implementing the Construction Sector Accord.
- **Increasing penalties for offences under the Building Act 2004 –** The common sentiment during the public consultation stage that current Building Act penalties are insufficient to promote compliance will be addressed. The timeframe for filing charges will also be extended, from 6 to 12 months.

One of the key proposals in the early stage of the reforms was to require compulsory insurance for new builds. This proposal has been left for now since the Government received clear feedback that the current building insurance market is unable to meet the demands introduced by a compulsory product.

It is expected that the building levy reduction will be confirmed by the end of 2019, to take effect from mid-2020. The rest of the proposals will be worked through with key stakeholders and a bill is expected to be introduced to Parliament in the first half of 2020.

Click here for more information.

New Government Procurement Rules to encourage better practices

New Government Procurement Rules came into effect on 1 October 2019, which will require government departments to consider "broader outcomes", such as a construction company's financial health and its actions in staff training and development, when awarding multi-million dollar construction projects.

This new approach can be contrasted with the previous "lowest price model" used across the sector. The "lowest price model" resulted in construction companies cutting costs and undercutting each other so intensely that some projects became financially unviable, said Economic and Urban Development Minister Phil Twyford.

The new rules will help address some of the key concerns raised through the Construction Sector Accord, including a focus on the whole of life public value and reducing financial risk, Building and Construction Minister Jenny Salesa said.

Click here for the Government's media release.

OTHER NEWS

✱ REAL ESTATE

Group launches petition requesting reform of unit titles legislation

A group comprising stakeholders in the unit titles sector have a filed a petition calling for urgent reform to the unit titles legislation in New Zealand.

The FLAU – an acronym for Fix Laws on Apartments and Units – is comprised of members including the Body Corporate Chairs Group, Home Owners and Buyers Association NZ, the Real Estate Institute of New Zealand, the Auckland District Law Society, and Strata Community Association New Zealand.

Issues with New Zealand's unit titles laws have long been identified particularly with respect to governance (for example, ensuring accountability and professionalism of body corporate managers, who can hold significant amount of body corporate funds), disclosure of information about the unit to prospective purchasers, long term maintenance plans and ways to deal with disputes within the body corporate.

Last year National MPs Nikki Kaye and Judith Collins launched a draft bill – the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill – to address issues identified with the current law. The Government did not adopt the bill. Consequently, the bill has been lodged as a Private Member's Bill under Judith Collins, which means it will be introduced when it gets picked out of a ballot held once a space on the Order Paper becomes available.

There has been continuing calls urging the Government to prioritise reforms and address problems in the unit titles sector as more apartments are being built in high density cities such as Auckland.

■ PROJECTS (CONSTRUCTION)

Bell Gully publishes a critical review of risk in the New Zealand construction market

Last month, Bell Gully partner Ian Becke, together with Glen Heath (CEO and General Counsel, Mansons TCLM), David Jewell (owner/director of BondCM), Craig Wheatley (Head of Legal, HEB Construction) and Krista Payne (Partner, Ashurst) authored a series of three articles focussing on the allocation of risk in the New Zealand construction industry.

The series was written in the lead-up to a panel discussion that took place on 10 October 2019 in Bell Gully's Auckland office.

The articles offer critical insights into whether it is appropriate to blame the problems plaguing the current construction industry, such as the prevalence of failed or delayed projects and insolvent contractors, on unfair risk allocation. In the final article in the series, the authors looked forward at options and initiatives for mitigating and allocating risks – both at an industry level and at a project-specific level – to consider where efforts for reform are best directed.

Click here to read the publication, "A critical review of risk in the New Zealand construction market".

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