PROJECTS AND REAL ESTATE NEWS

JANUARY 2022

WELCOME

to Issue No. 9 of Projects and Real Estate News, Bell Gully's regular digest on regulatory developments, together with cases and news of interest in the **projects** and **real estate** sectors.

IN THIS ISSUE:

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CONTENTS

PAGE

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Projects and Real Estate News is a regular digest on regulatory developments, together with cases and news of interest in the projects and real estate sectors.

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CASE NOTES

✱ REAL ESTATE

Lessons from the High Court concerning landlord's refusal to renew lease

SGAH Investments Ltd v Mei Enterprises Ltd [2021] NZHC 1588

Key Takeaways:

Where a landlord refuses to renew the lease, a tenant has up to three months from the date of the landlord's notice to apply for court relief against the refusal.

If a landlord validly serves two or more successive notices refusing to renew the lease, the legal effect of the earlier notice may be extinguished and the subsequent notice regarded as the "operative" notice.

As the time limit for the tenant to apply for court relief starts to run from the date of the operative notice, serving more than one notice could expand the time available for the tenant to apply for relief.

Where a landlord's refusal to renew the lease was triggered by rent arrears, the court will typically grant relief once the arrears are cleared. Even if the tenant had engaged in bad conduct that damaged the parties' commercial relationship, once the arrears are paid a high threshold for such conduct exists before the court will refuse relief.

In summary: This case concerned the decision by SGAH Investment Ltd (the **Landlord**) to refuse Mei Enterprises Ltd (the **Tenant**) a renewal of its lease. In accordance with the Property Law Act 2007 (**PLA**), the Tenant applied to the court for relief against the Landlord's refusal to renew the lease. The court ultimately ordered that the lease be renewed. The two main points to note about this decision are:

- **If a landlord validly serves two or more successive notices refusing to renew the lease, the landlord may be taken to have waived its right to rely on the earlier notice.**

  Under the PLA, if a landlord refuses to renew the lease, the tenant has up to three months from the date of the landlord's notice to apply to the court for relief against the refusal. In this case, the Landlord served two notices refusing to renew. The second notice was served one and a half months after service of the first notice. The court had to decide whether the time limit started to run from the first or the second notice.

  If the first notice was the operative notice, the Tenant would have been out of time to apply to the court for relief. If the second notice was the operative notice, the Tenant's application would have been made in time.

  In concluding that the second notice was the operative one, the court opined that in enacting the relevant provisions under the PLA, Parliament had intended notices refusing renewal of leases must be issued in a way that would not result in a tenant being confused as to its rights and the obligations to be satisfied, should it choose to exercise those rights. A tenant needs to be informed in the clearest possible way of when time for seeking relief will expire.

  The court further concluded that in cases where a landlord validly issues two or more successive notices refusing renewal, Parliament intended that on the issue of each successive notice, the legal effect of the earlier notice is automatically extinguished and therefore no longer available as setting the limitation period for time to run under the relevant PLA provision.

- **Where a landlord's refusal to renew has been triggered by a tenant's rent arrears, the court will typically grant relief against a refusal to renew once the arrears are paid.**

  After holding that the Tenant made the application for relief in time, the court then had to consider whether relief should in fact be granted to the Tenant.

  In this case, the Tenant had engaged in a series of combative behaviour against the Landlord in an attempt to pressure it into renewing the lease. This included issuing separate proceedings against the Landlord claiming damages for misrepresentation and withholding the rent on the belief that it was entitled to set-off the rent against this claim. The Tenant also threatened to advise the local body of building defects in the premises and then served the Landlord with a trespass notice when the Landlord tried to access the premises with a builder to check the complaints, and applied to liquidate the Landlord without any legal basis.

  By the time this case was heard in court, however, the Tenant had paid the rent and cleared the arrears.

  In contending that relief should not be granted, the Landlord expressed scepticism about whether the Tenant would continue to pay the rent and submitted that the above examples of bad behaviour have left the relationship between them beyond repair.

  The court accepted that the Tenant behaved very badly and not in a way that is usually associated with commercial parties. The typical approach in commercial leases that once rent arrears are paid relief should be granted stems from the assumption that commercial parties will conduct themselves in a commercially sensible way.

  The court ultimately granted relief to the Tenant, highlighting that once rent arrears are cleared, a high threshold for bad behaviour exists before the court will refuse relief. Whilst the court said the Tenant's behaviour had "come close to the tipping point", it observed that the balance lie in the Tenant's favour since the parties had been in a lease relationship for a few years without dispute before the matters in this case, which showed the Tenant is capable of behaving sensibly. The Tenant's discontinuance of the liquidation proceedings and its payment of rent arrears, albeit at the final hour, also showed that the Tenant can accept the error of its ways and the need to make good with its conduct. Further, there was no evidence of the Tenant's solvency being in doubt.

Caveat over property based on terminated sale and purchase agreement?

Cassiny Ltd v Hounslow Holdings Ltd [2021] NZHC 3039

Key Takeaways:

A caveat cannot be sustained on the basis of a cancelled agreement to purchase land.

However, once an agreement is cancelled, the purchaser may have a lien over the return of the deposit and other funds from the vendor, which may support a caveat.

The proper course for a purchaser in these situations is to withdraw the caveat based on the (terminated) agreement, and lodge a new caveat based on the lien.

In summary: This decision stemmed from a sale and purchase agreement to purchase bare land. Cassiny Ltd (the **Purchaser**) signed an agreement to purchase the property from Hounslow Holdings Ltd (the **Vendor**). The agreement was conditional on due diligence and agreement being reached as to registration of certain covenants. The Purchaser planned to subdivide the property and on-sell the resulting lots.

The agreement was declared unconditional. Before settlement, the Purchaser and a company it allegedly nominated to complete the purchase (the **Alleged Nominee**) each lodged a caveat against the property. As it later turned out, the nomination was never perfected and was ineffective.

The Purchaser failed to settle on the settlement date. In accordance with the agreement, the Vendor issued a settlement notice requiring settlement within twelve working days. The Purchaser issued proceedings against the Vendor, seeking an injunction and claiming the settlement notice was invalid and that the agreement was subject to an implied term that it was conditional on resource consent being issued. Without the resource consent, the Purchaser claimed, it was unable to obtain the finance necessary to settle.

The court rejected both arguments, noting an implied term regarding the issue of the resource consent was not strictly necessary — the Purchaser's ability to obtain finance was a matter solely for the Purchaser, and here it took on the risk itself by not expressly making the agreement conditional on resource consent being issued.

After this judgement was delivered, the Vendor cancelled the agreement. The Vendor also applied to lapse the caveats. The Purchaser and the Alleged Nominee applied for court orders that the caveats not lapse, which were opposed by the Vendor.

As is the established law in these types of cases, the onus is on the caveator (in this case, the Purchaser and the Alleged Nominee) to show a reasonably arguable case to sustain the caveats that they lodged.

The court noted the two main difficulties for the Purchaser and the Alleged Nominee in this case:

- **A purchaser under a sale and purchase agreement for land has a caveatable interest in the subject land, but the interest based on the agreement does not survive cancellation of that agreement.** It was a fundamental problem for the Purchaser and the Alleged Nominee that the agreement, which they relied on to lodge the caveat, had been cancelled. A caveat will be removed or allowed to lapse where, even if there was a valid ground for lodging it in the first place, that ground no longer exists.

- **The caveat may be supported if a purchaser claims a lien over the return of the deposit and other funds under the agreement.** This may be applicable only if the purchaser is not itself in default under the agreement. However, the caveat must correctly record the basis for the interest is a lien, rather than the (terminated) agreement. The Purchaser's solicitor raised an interesting argument that the Purchaser has a lien to support its claim for the return of the deposit.

  The court observed that a purchaser under a terminated sale and purchase agreement may, in certain cases, have a purchaser's lien in relation to the deposit and other funds. Where a contract for sale of land is cancelled by the purchaser or avoided by the failure of a condition, the purchaser may become entitled to recover the deposit and perhaps other sums in accordance with the agreement from the vendor. Such circumstances may be sufficient to support an equitable lien on the land for such amounts which will support a caveat.

  The court further observed that some Australian authorities suggest a purchaser's lien may extend to cases where the purchaser was itself in default under the sale and purchase agreement. Much of the relevant authority, however, indicated the purchaser's lien is only applicable in cases where the purchaser has not been in default. In this case, the Purchaser had been in default by failing to settle.

  Ultimately, though, it was not necessary for the court to resolve this issue, because the caveats lodged by the Purchaser and the Alleged Nominee were based on the sale and purchase agreement. If they contend the caveats be sustained on the basis of a lien, they should withdraw the caveat based on the agreement and replace it with a caveat based on the lien.

Bell Gully specialises in a range of real estate transactions, including complex and large-scale sales and purchases and developments. Please contact one of our real estate lawyers if you have an issue that requires attention — we would be happy to assist.

REGULATORY UPDATES

✱ REAL ESTATE

Ministry of Justice guidelines on "fair proportion" of rent abatement

The Ministry of Justice has released guidelines, together with a summary to accompany the guidelines, to assist commercial landlords and tenants to agree on a "fair proportion" of rent abatement under recent changes to the Property Law Act 2007.

The law change saw the insertion of a covenant into certain commercial leases (that do not already have a clause requiring a rent abatement during periods of inaccessibility by the tenant due to an emergency). The clause requires the parties to agree on a "fair proportion" of rent reduction when there is an epidemic and the tenant cannot access all or part of the premises to fully conduct their business due to epidemic related health and safety reasons. The covenant applies retrospectively from 18 August 2021.

We have previously written on the law change here. The covenant only applies to the extent that the parties have not already agreed, before 18 August 2021, on a rent reduction for a rental period falling after 18 August 2021 due to the tenant's inability to access the premises.

The law change did not provide any guidance as to how a "fair proportion" should be assessed, other than specify a matter that the parties must consider is the loss of income experienced by the tenant because of their inability to access the premises due to the epidemic.

The Ministry of Justice guidelines now provide further guidance to assist the parties subject to the law change to determine a "fair proportion". The guidelines are of an advisory nature only, and have no legal effect. The Ministry has also stated that the guidelines may not be relevant for other rent abatement clauses in leases (for example, those which do not expressly direct the parties to consider the tenant's loss of income — such as the "no access in emergency" clause found in the standard Auckland District Law Society (ADLS) Deed of Lease form).

Property Council New Zealand guidelines

The Property Council New Zealand also compiled guidelines here to assist parties in commercial leases to resolve disputes regarding rent reduction under the law change. They are an additional resource in this regard, but please note they are also of an advisory nature only.

Bill aimed to accelerate housing supply passed into law

The Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill was passed last month with the support of Labour and National.

The bill aims to amend the Resource Management Act 1991 to accelerate housing supply in urban areas. The most controversial proposal in this bill was to enable up to three dwellings with up to three storeys to be built on almost all residential sites in Auckland, Wellington, Christchurch, Tauranga, and Hamilton

without resource consent. With the passing of the bill this will be permitted to occur from August 2022. Building consent for such dwellings will still be required.

Select committee recommendations to moderate the density outcomes of this proposal, including by a reduction to the height in relation to boundary rules, an increase in the outdoor living area for ground units, and an increase in outlook spaces, have been adopted.

Bell Gully has previously written an update on the select committee recommendations for this bill. For more information, you can also contact our Resource Management team led by Andrew Beatson and Natasha Garvan.

Select committee unanimous that amendments to Unit Titles Act be passed

The Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill proposes changes to the Unit Titles Act 2010 (the **Act**) and associated regulations. The bill is currently awaiting its second reading in Parliament, with the select committee having recommended unanimously that it be passed. The committee recommended all amendments unanimously, except for three, which it recommended by majority.

The bill aims to improve transparency and accountability in how bodies corporate are run and managed, and to simplify the disclosure regime that applies when an owner of a unit title property sells it. In this respect many of the proposals provide a welcome starting point to improve body corporate governance as higher density housing such as apartments become increasingly common, particularly in the main urban centres.

The select committee report is available here. Notable changes proposed by the bill include:

- **Disclosure regime when selling unit titles —** The bill proposed changes to the disclosure regime that applies when the owner of a unit title property sells it. Currently, the disclosure regime requires a vendor to provide to the purchaser a pre-contract disclosure statement, a pre-settlement disclosure statement and (if requested by the purchaser) an additional disclosure statement within set timeframes. Failure to provide a pre-settlement disclosure statement and/or an additional disclosure statement in time could give the purchaser the right to delay or cancel settlement.

  The bill proposed dispensing the pre-settlement disclosure statement. The committee disagreed and suggested dispensing the additional disclosure statement instead. The bill also proposed to increase the information disclosed in a pre-contract disclosure statement, and extend a purchaser's delay and cancellation rights mentioned above to pre-contract disclosure statements. The committee broadly agreed with these amendments, but suggested limitations on the extent to which a purchaser can exercise delay and cancellation rights.

  The bill also proposed separate pre-contract disclosure requirements for developers of "off the plan" unit title developments.

- **Special provisions for developments comprising 10 or more principal units —** The bill imposes special provisions on medium and large developments. The bill currently distinguishes between medium and large developments with reference to how many residential units they comprise.

  The committee was of the view that this distinction should be removed, and instead recommended a single definition of "large development" as a development with 10 or more principal units, with the special provisions applying to all types of large developments, including commercial and mixed use developments.

  The special provisions include a mandatory requirement to hire a body corporate manager (unless the body corporate opts out by special resolution), have a long-term maintenance (**LTM**) plan

covering 30 years (the current requirement is 10 years), and removing the ability for bodies corporate of large developments to opt out of having a LTM fund. A LTM fund contains the money set aside from levies for maintenance accounted for in the LTM plan.

The committee made suggestions to water down the 30-year LTM plan proposal, to address concerns that 30 years could be too long and require a body corporate to make significant assumptions about building durability. The committee also suggested that bodies corporate of large developments should be able to retain the flexibility to opt out of having a LTM fund.

- Body corporate governance matters — The bill seeks to create better transparency and accountability by strengthening the governance rules that bodies corporate must follow, including by significantly improving a body corporate's ability to use electronic tools, so that it can hold a general meeting by remote participation and vote electronically. The changes also require body corporate committee members to comply with a code of conduct, specify how the committee should manage conflicts of interest, introduce mechanisms to prevent "proxy farming" in voting situations, and other administrative matters regarding the running of body corporate meetings.

- Body corporate managers — Body corporate managers can run the body corporate on the body corporate's behalf, and provide regulatory compliance, financial and administrative services to the body corporate. It can be a role with significant responsibility with control of large sums of money. Body corporate managers are currently not regulated.

  The bill introduces requirements for body corporate managers to belong to a professional industry body and rules for managing conflicts of interest, together with a code of conduct that they must abide by. While the committee disagreed with the need for body corporate managers to belong to a professional industry body, there was broad consensus for the code of conduct. It was noted that a similar code exists in Queensland, and suggested that similar provisions should be adopted for New Zealand.

- LTM plans — Whilst the bill proposed adding a requirement for LTM plans to "identify any defects in, or repairs required to, the unit title development", most of the committee disagreed with this proposal as it considered it would confound the concept in building law of "defect", which is usually an unexpected issue that needs urgent repair, as opposed to "maintenance", which accords with regular and planned upkeep.

- Reassessment of utility interest — Bodies corporate collect levies from unit owners. If the body corporate chooses to, it can collect different amounts of levies from different units based off the "utility interest". Generally, units that use more of the development's utilities, such as plumbing and lifts, will have a larger utility interest and pay more in levies. The bill introduces a power for new developments to reapportion utility interest so that levies could be calculated more fairly with reference to a unit's use of a particular utility. The committee recommended extending this ability to existing developments.

- Enforcement and dispute resolution provisions — The bill proposed changes to the fees payable when parties apply to the Tenancy Tribunal in respect of unit title disputes. The threshold for unit title disputes that can be heard by the Tenancy Tribunal is also proposed to increase from NZ$50,000 to NZ$100,000. Additional powers are also proposed to be given to the relevant enforcement authority to enforce and investigate breaches, including the power to issue improvement notices, take court proceedings on behalf of others, and to apply to the Tenancy Tribunal to impose financial penalties on a body corporate or body corporate manager for certain breaches of the Act.

PROJECTS

MBIE publishes National Construction Pipeline Report

The National Construction Pipeline Report 2021, published last month by the Ministry of Business, Innovation and Employment's (**MBIE**) Building System Performance's Research and Analysis team, provides a projection of national building and construction activity over a six-year period.

It includes national and regional breakdowns of actual and forecast residential building, non-residential building and infrastructure activity.

The report is based on building and construction forecasting by the Building Research Association of New Zealand (**BRANZ**), and data from Pacifecon NZ Ltd (a building economics consultancy), on known non-residential building and infrastructure intentions.

MBIE has summarised the key findings of the report:

- **Construction activity has held up well against the COVID-19 pandemic and is expected to continue to do so**
  - Residential buildings contributed 58% of total construction value in 2020.
  - National construction activity is forecast to continue growing steadily to about NZ$48.3 billion up to 2024.

- **Residential construction will grow through to 2023**
  - Multi-unit dwellings accounted for 44% of all dwellings consented in 2020.
  - 265,000 new dwellings will be consented over the next six years at an average of over 44,000 dwellings a year.
  - Detached dwelling consents will peak at about 26,500 in 2023, whereas multi-unit consents will peak slightly earlier at 21,300 in 2022.

- **Growth in non-residential activity throughout the forecast period**
  - Commercial buildings are the most prominent non-residential building work, contributing 47% of the total number of projects and 47% of total value.
  - Non-residential activity is forecast to reach NZ$10.2 billion in 2025 and NZ$10.3 billion in 2026.

- **Growth in infrastructure activity throughout the forecast period**
  - Infrastructure activity fell slightly between 2019 and 2020 to NZ$9.2 billion. In 2020, it represented one-fifth of total building and construction value.
  - Transport, water and subdivision projects will dominate new infrastructure activity in 2021, contributing 87% of projects and 83% of the total value.
  - Infrastructure activity is forecast to steadily increase to reach NZ$11.2 billion in 2026.

Addressing climate change: Building Code updates

The Ministry of Business, Innovation and Employment (**MBIE**) proceeded with updates to acceptable solutions and verification methods to make new builds warmer, drier and healthier.

In the media release published by the government, these updates were referred to as "the biggest energy efficiency changes to the Building Code in more than a decade."

The Building Code regulates all building work in New Zealand and sets the minimum performance requirements that all building work must meet to ensure buildings are safe, healthy, durable and fit-for-purpose. The updates will impact insulation requirements for housing and small and large buildings, heating, ventilation and air conditioning (**HVAC**) systems in commercial buildings, and natural light requirements and weathertightness testing for high-density housing.

The effective date for the new acceptable solutions and verification methods was 29 November 2021 with a transition period of one-year ending on 3 November 2022, except for the new window insulation requirements in the warmest climate zones, which will have a different phased in approach with the aim being that by the end of 2023, all parts of the country will have a similar minimum level of window insulation requirements.

MBIE also noted submitters expressed uncertainty about how the Building Code would address climate change in the future. The outcome document discusses the building and construction sector climate change response and shows the high-level timeframe for this response. Additional information is provided in the discussion on the energy efficiency changes. The outcome document contains further information on how future updates to the Building Code will continue to focus on reducing carbon emissions.

As part of this year's update, MBIE is also re-issuing the guidance documents "Earthquake geotechnical practice series (Modules 1 - 6)" under section 175 of the Building Act. These modules were developed alongside the New Zealand Geotechnical Society and Engineering New Zealand and were first published in 2016 and 2017.

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