The Lie of the Land: Property Case Law Developments in 2018

Last year saw some interesting, and somewhat surprising, property law developments. The Anderson Lloyd property team have summarised some of the key cases below with key take out points included for future reference.

Liabilities of earthquake prone building owners

Alura Ltd v Hutt City Council [2018]

The Hutt City Council prosecuted Alura Ltd under the Building Act 2004 for ignoring Council demands to demolish or strengthen its Jackson Street property. For the previous 34 years, the property was identified as posing a significant risk in the event of an earthquake. The Court concluded that this prolonged defiance amounted to a deliberate omission by Alura Ltd. This type of prosecution carries a maximum fine of $200,000, which was heavily reduced to $37,500 following Alura Ltd's guilty plea. The Court emphasised the public interest nature of this case, given that Alura Ltd leased the property to tenants and the risk it posed to the safety of both its tenants and pedestrians. Furthermore, this case is to be seen as a deterrent to other building owners who fail to meet Council requirements.

Key takeaway point: Owners of buildings that are deemed to be earthquake prone face the risk of being prosecuted if they do not demolish/repair their buildings in a timely manner.

Subdivision or not?

Spark New Zealand Trading Limited v Clearspan Property Assets Limited [2018] NZCA 248

Spark builds cell towers on third parties' land by negotiating a lease. Clearspan has, on multiple occasions, taken over these leases by acquiring a share in the underlying land and becoming a tenant in common with the land owner and creating two new records of title (one for Clearspan and one for the original owner). The land owner and Clearspan would then enter into mutual covenants (registered by way of encumbrances) whereby each agreed not to enter into the exclusive-use area of the other and to grant the other rights to control their exclusive areas. The Court of Appeal considered whether this arrangement was a 'subdivision' for the purposes of section 218 of the Resource Management Act 1991 (**RMA**). If so, the arrangement would be subject to significant restrictions (namely, the requirement to obtain local authority consent). The Court of Appeal considered an earlier High Court case, which distinguished a subdivision from simply drawing a line on a plan. Rather, the High Court held that section 218 was a code and was intended to capture subdivisions which involved the division of land resulting in more intensive use. This, the Court concluded, clearly indicated Parliament's intention to exclude most interests and divisions that could not be classified as posing material environmental implications. Given the nature of this arrangement, it could not be said to pose such implications and therefore did not fall within the definition of a subdivision.

Key takeaway point: This alternative to subdivision (and any other similar legal structures which do not fall within the ambit of section 218 of the RMA) will not be considered 'subdivisions' for the purposes of the RMA.

The importance of the comma

Volumex Nominees Ltd v Attorney-General [2018] NZHC 647

The High Court considered the grammatical interpretation of a clause in a lease, which required a Tenant to "pay …for telephone, gas, electricity, and any other Tenant consumable supplied to and actually consumed on the Premises." Volumex, as the owner of the building, argued that the comma after 'electricity' split the sentence into two parts. The first part, they

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argued, required the Tenant to pay all charges for the amenities listed, while the second part of the sentence required the tenant to pay for any other amenities, either supplied to or actually consumed by the Tenant. Volumex's interpretation would greatly expand the scope of amenities for which the Tenant was responsible. The High Court looked to grammatical rules to interpret the meaning of this Oxford comma and found that the clause would have to read "for telephone, gas, and electricity, and any other Tenant consumables" to effectively separate it into two parts. Therefore, the High Court concluded that, despite the Oxford comma, the Tenant was only required to pay for amenities that were both supplied to and consumed on the Premises. When interpreting a contract, the High Court emphasised the plain meaning of the words in light of their typical grammatical understanding.

Key takeaway point: Be careful with your comma usage.

What constitutes a sale and purchase agreement?

Fraser v McHardy [2018] NZHC 535

The High Court considered whether informal discussions between the Defendants and the Plaintiffs could constitute a contract for the sale and purchase of a property. Thomas J concluded that even if there was offer and acceptance, the terms were not sufficiently clear to bind the parties. The parties had not discussed the payment of GST or a deposit. Furthermore, there was no intent to create legal relations (i.e. no intention between the parties to be bound by the agreement), given none of the written agreements between the parties were signed and their discussions only involved one of the owners of the land. Furthermore, the Plaintiffs did not secure the contract by paying a deposit. The Court agreed that the uncertain terms and informal agreements fell short of the customary method of dealing in New Zealand, which both parties had complied with in previous transactions. This confirmed the agreement was not intended to constitute a completed sale and purchase. The Plaintiffs tried to argue they partly performed the contract by selling a property to pay for the deposit, and so it would be unfair for the Defendants to sell to a third party. This argument was unsuccessful given the Plaintiffs placed the property on the market before the date the parties allegedly formed a contract.

Key takeaway point: There needs to be more than just agreement on a few key terms to constitute a binding sale and purchase agreement.

Easement or licence?

Street v Fountaine [2018] NZCA 55

The Court of Appeal considered whether a scheme created in the 1970s, where pipes were installed on two farms for the benefit of the surrounding farms, constituted a licence or an easement. A licence is a non-binding personal arrangement which is generally terminated by a change of land ownership and can be revoked at will. On the other hand, an easement can be protected by a caveat and binds future parties. While easements are generally registered, an unregistered interest, like in this case, can still be recognised as capable of binding the parties. Failure to register an easement is not evidence that no easement was intended. The Court of Appeal considered that the placement of pipes was an expensive and time consuming investment. A common sense interpretation of this expenditure was consistent with the parties intending a long-standing agreement like an easement. Furthermore, the Respondents created an expectation that there was an easement by allowing the scheme to continue despite many ownership changes. This was more consistent with an easement than a licence. The Court of Appeal concluded that an easement was granted in the 1970s and continued to operate today.

Key takeaway point: Placing pipes in the ground on a long term basis will likely be held to be an equitable easement.

A definition of untenantability?

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Precinct Properties Holdings Limited v OMV New Zealand Limited [2018] NZHC 1939

Precinct Properties leased the ninth and tenth floors of Deloitte House to OMV. This building was damaged in the 2016 Kaikoura earthquake and was unable to be occupied for four months. OMV claimed the damage rendered the building untenantable and so the lease was terminated in accordance with clause 26(a) of its standard form ADLS lease. Precinct Properties did not accept the building was untenantable and commenced summary judgment proceedings for the unpaid rent. In determining whether the building was untenantable, the High Court applied the Court of Appeal's decision in *DFC New Zealand Ltd v Samson Corporation Ltd*, where it was held the damage needed to have some degree of permanence. Something transitory or temporary would not be sufficient. The High Court further ruled that untenantability included where a building did not meet a minimum structural integrity requirement. However, it was not specified what this minimum requirement was as this was a matter to be determined at trial. The summary judgment application was unsuccessful as Precinct Properties was unable to show that OMV had no defence to its claim for rent.

Key takeaway point: It may be possible for a tenant to argue that a building is untenantable due to the required structural integrity not being met, with the result the lease can be terminated.

Who has authority to contract on behalf of a company?

Bishop Warden Property Holdings Limited v Autumn Tree Limited [2018] NZCA 285

Autumn Tree was incorporated for the purpose of developing a property in Meadowbank. On the evening of 3 August 2017, Tina, as director of Autumn Tree, entered into an agreement to sell this property to Bishop Warden. Previously, Tina was the sole director of Autumn Tree. However, Anna was registered as a new director with the Companies Office at 1.10pm on 3 August 2017. Tina's removal as a director was recorded on 5 August 2017 at 10.21am with effect from 3 August 2017. The issue was whether Tina had authority to bind Autumn Tree under the agreement. The decision ultimately turned on the High Court's finding that Anna was likely shown as a director of Autumn Tree on the Companies Register before the agreement was entered into, meaning both Tina and Anna were held out by Autumn Tree as directors. This finding was confirmed in the Court of Appeal. It was held that the authority of one of a number of directors was very limited and that one director did not customarily have authority to enter into a transaction to dispose of all of the assets of the company and as such, Bishop Warden was not able to rely on the "indoor management rule" in section 18(1) of the Companies Act 1993. The Court of Appeal concluded the High Court was correct in finding the agreement was invalid.

Key takeaway point: When contracting with a company in relation to the disposal or purchase of all or nearly all of the company's assets, if there is more than one director listed on the Companies Register, at least two directors need to sign the agreement to avoid it being held invalid. The Companies Register will need to be checked immediately prior to signing the agreement.

Want to know more?

If you have any questions about property issues, please contact our specialist property team.