

NEWSLETTER

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WATER - USE AND CONSENTS

Having a lake or a river on a property does not mean that the owner of the property is allowed to take whatever water they desire. Water is a limited resource in New Zealand, and is managed by Regional Councils under the Resource Management Act ('RMA').

Regional Councils produce environmental plans detailing controls for water usage in their region. This includes determining when a person must apply for Resource Consent to take water.

Dairy farming continues to develop throughout New Zealand and consequently agricultural methods are becoming more water intensive. At the same time, growing cities mean increased municipal water requirements. The combination of these factors results in increased demand and competition for water. Some catchment areas are now considered

over-allocated, and with a focus on sustainable water management, many Regional Councils are re-evaluating their water allocation policies.

TAKING OF WATER

Certain rights to take water are granted by the RMA, including the taking of water for "reasonable domestic water needs", drinking water for stock (provided that these activities have no adverse environmental effects) and for the purposes of firefighting. Beyond these, a party may be required by their Regional Council to apply for Resource Consent to take water.

Depending upon the Regional Council and area, different amounts of water can be taken as a permitted activity (i.e. without Resource Consent). These amounts may vary depending on whether the water is being taken from above or below ground, the catchment area, property size, frequency, and even time of year (many Regional Councils have different rules for periods of low rainfall).

AN EXAMPLE - THE WAIKATO REGION

There are catchment areas within the Waikato Region that are considered over-allocated, and demand continues to increase.

The Waikato Regional Council has introduced a variation to the Regional Plan, known as 'Variation 6' which changes the rules for the taking of water. Generally the variation means that a farm taking water beyond 15 cubic metres per day, and using water for dairy shed washdown and milk cooling must apply for resource consent.

These Resource Consent applications are then to be processed by catchment area, which should reduce processing costs. When the consents are processed, some applications will be treated differently:

- Those properties that had consent to take water for dairy shed washdown and milk cooling

on 15 October 2008 are to be granted consent to take (at least) the same amount of water as under their 15 October 2008 consent, provided certain conditions are met.

- Properties that did not have a consent at that time will be subject to further requirements, and are not assured that consent for the full requested take will be granted.

Farmers in the region are recommended to obtain advice as to whether they are required to apply for Resource Consent, even if they do not take over 15 cubic metres of water. This is particularly applicable

if they are in areas that are over-allocated. Resource Consent applications must be made by the applicable deadlines to assist in ensuring ongoing water rights.

It should be noted that each region has very detailed rules regarding water usage. Therefore if you are unsure about your rights and obligations in respect of water usage it is advisable to seek legal advice.

COMMERCIAL LEASES – RIGHTS OF RENEWAL

Many tenants under commercial leases seek to negotiate a shorter initial term with rights to renew the lease in the future, rather than committing to a long term lease at the outset. These rights are referred to as 'rights of renewal', and allow the tenant some flexibility by giving them the right (subject to certain conditions) to renew the lease for a further term or let the lease expire.

EXERCISING THE RIGHT

Generally a right of renewal is not exercised automatically. It is important therefore that any tenant wanting to stay in the premises is aware of the need to exercise the right of renewal, and to do so in advance. Continued occupation of the premises after the expiry of the current term does not mean the lease has been renewed. Although commercial leases vary, the widely used Auckland District Law Society lease requires the tenant to give at least three calendar months' notice of their intention to renew. This is usually done by the tenant giving written notice to the landlord, in accordance with the terms of the lease, that they wish to renew the lease. If notice has not been given before the last three months of the term, the right to renew the lease may lapse, as the period of notice is a term of the renewal.

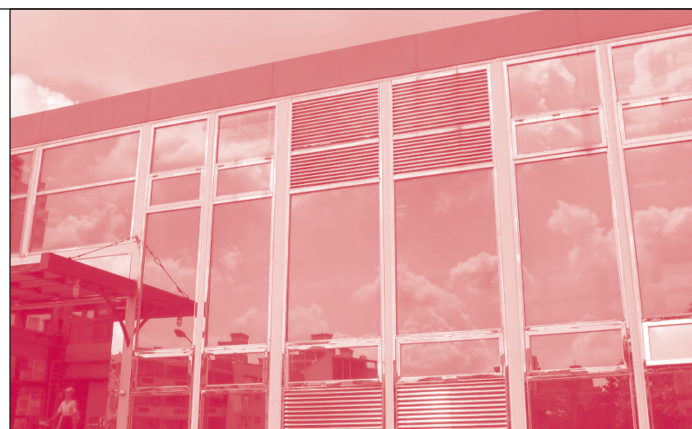
The tenant's decision to give notice of the intention to renew the lease must be carefully considered. It is a commitment to be responsible for all obligations under the lease for a further term, often a number of years.

BREACH OF THE LEASE

Almost all leases will provide that a tenant cannot exercise their right of renewal if they are in breach of the lease. Tenants must ensure that when they give notice of their intention to renew the lease they are complying with all their obligations under the lease, including any non-monetary obligations. A tenant is advised to ensure they are aware of their obligations under the lease in advance of renewing the lease.

A NEW LEASE

Where the lease is renewed pursuant to a right of renewal, it is deemed to be a new lease, rather than

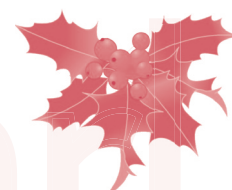


an extension of the prior lease. The landlord is entitled to require, as part of the renewal, that any guarantor of the existing lease also guarantee the new lease. It is therefore recommended that a landlord has the renewal formally documented, and signed by the guarantors to record their ongoing obligations. Guarantors should also review all aspects of the lease and think carefully prior to agreeing to this obligation.

WHEN THE LEASE IS NOT RENEWED

Provided that sufficient notice has been given, the tenant is not in breach and is complying with any conditions of the renewal of lease, the landlord must agree to a renewal of the lease. A tenant who has a right to renew the lease, and that right has been refused by the landlord, may apply to the Court for relief under the Property Law Act.

If you have missed the deadline for exercising a right of renewal, you wish to renew the lease but are in breach, or you have been refused by the landlord, contact your solicitor promptly. If relief from the Court is necessary, there are time limits within which you must apply.



PERSONAL PROPERTY SECURITIES REGISTER AND TERMS OF TRADE



Since 2002, New Zealand has had a universal register on which parties are able to register any security taken over assets (other than land) called the Personal Property Securities Register ('PPSR'). Security is rights in respect of an asset granted to a creditor to support your obligations to them. These rights commonly include the right to take ownership or control of the asset if you do not meet your obligations.

Anyone can register security (called a 'financing statement') for a small fee. The financing statement identifies the debtor (the party giving security), the secured party (creditor), and the collateral (the assets to which the security applies).

The priority of competing security interests depends on when the security interest was registered. Generally priority relates to the date of registration, even if the underlying security agreement was completed much earlier. If a financing statement is not registered, registered securities take priority. Therefore prompt registration is key.

IMPACT ON TERMS OF TRADE

Before the PPSR, it was common for a supplier's 'Terms of Trade' to include a clause recording that ownership of the goods remains with the seller until payment for the goods is made in full (commonly known as a 'Romalpa clause'). However, the Terms of Trade alone will not protect against parties who have registered security. To obtain priority over other registered creditors, a financing statement must be registered on the PPSR.

CONSEQUENCES ON LIQUIDATION

When a business goes into liquidation, the assets of

the business are realised to repay as much of the debt as possible. Where there are competing creditors, the order in which they receive their share of any proceeds is determined by their 'priority'. Secured creditors have priority over unsecured creditors but even amongst secured creditors there is a pecking order. A creditor with a registered security interest takes priority over a creditor with unregistered security. Furthermore, a creditor with an earlier registered interest takes priority over a later one.

Since it is common for a bank to have a registered security interest over a trading company's present and future property, a supplier of goods or services on credit with an unregistered security interest takes a big risk.

PURCHASE MONEY SECURITY INTERESTS

Fortunately, there is an exception to the normal priority rule. A Purchase Money Security Interest ('PMSI') is possible when personal property is taken as collateral to ensure the payment of the purchase price, and can apply to Terms of Trade type situations. A PMSI can take priority over an earlier general security.

In order to ensure the priority of a PMSI the supplier needs to ensure that:

- The buyer has agreed in writing to the security interest, and
- The security interest is registered within 10 days of the buyer taking possession.

A supplier is not required to register a separate financing statement every time it supplies goods, but rather can register a financing statement to secure goods supplied from time to time on credit.

EXPIRY

Financing statements expire after five years. Once they expire the original registration date is lost, and with it priority is lost. Prior notice of a pending expiry is not given by the PPSR. It is up to the secured party to monitor their registered security interests to ensure they are renewed before they expire.

ADLS BUILDING REPORT CLAUSE 9.3

Recently the Auckland District Law Society ('ADLS') updated their Agreement for Sale and Purchase of Real Estate ('Agreement'). This Agreement is the most common contract used for the sale and purchase of real estate throughout New Zealand.

Amendments included the introduction of a pre-prepared clause for the purchaser's use when making the Agreement conditional upon a satisfactory builder's report. This clause is included by indicating 'yes' on the front page of the Agreement, similar to a LIM report

condition. Previously, specific building report clauses were frequently prepared and inserted by the agent or purchaser's solicitor. These were contractual terms recommended to a purchaser to benefit them and protect their interests.

These clauses were used by the purchaser to request that outstanding repairs and maintenance be completed, or negotiate reductions in the price or in some instances, cancel the agreement.

The clauses varied but tended to either:

- Allow the purchaser to cancel immediately (as adopted by the ADLS Agreement), or
- Set out a process by which the vendor is given the option of remedying issues raised in the building report, and only upon a refusal to do so, could a purchaser cancel.

THE NEW CLAUSE

The details of the building report condition are in clause 9.3 of the Agreement. It records that the Agreement is conditional on the purchaser obtaining a satisfactory building inspection report, with the purchaser to advise within 10 working days if the building report is unsatisfactory. Crucially, the clause contains the requirement that this report be "prepared in good faith by a suitably-qualified building inspector in accordance with accepted principles and methods".



'SUITABLY QUALIFIED'?

The meaning of "suitably qualified building inspector" is vague, with a builder or at least someone experienced in the building industry envisaged. The ADLS have indicated that in principle this can include an ordinary builder, provided

the builder has experience in the particular type of building that is being inspected.

It is in the purchaser's best interest to obtain a thorough inspection and report from a builder or specialised building inspection company that is experienced in inspecting properties and has appropriate liability insurance in place. A purchaser cancelling the agreement based upon a building report must, if requested, immediately provide a copy of the report.

It is possible that purchasers who attempt to avoid agreements may find themselves being challenged by vendors, as the clause requires an objective assessment of the property. As yet it has not yet been established what issues will be too insignificant to justify cancellation. Regardless of the provisions of the clause, it may still be possible for parties to co-operate and agree for any issues raised in a builders report to be remedied prior to settlement.

The new clause may not always meet your needs. A vendor of a building with identified issues may want the option of undertaking the works prior to settlement, to prevent the sale being cancelled once an inspection has been obtained. It is always prudent to seek legal advice before signing an Agreement, to explore alternative or additional provisions as necessary.

SNIPPETS

LAWYERS V CONVEYANCERS

Not everyone acting for a buyer or a seller in a real estate transaction is a lawyer. The Lawyers and Conveyancers Act 2006 introduced to New Zealand the separate profession of 'Conveyancer'. Conveyancers are distinct from 'Lawyers' or 'Solicitors'. They are not required to hold law degrees or be supervised by lawyers.

Lawyers may provide a full range of services to the public, being both conveyancing services, and general legal services. Conveyancers may provide conveyancing services, but are unable to advise on other areas of law.

Buying or selling a property or business rarely happens in a vacuum. Personal, business and financial factors are all often critical considerations. Your lawyer can not only advise on the transaction at hand, but also on how the transaction will affect you and your family. Relationship property laws, estate planning and protection from creditors, while not an extensive list, are all factors you should be talking to your legal adviser about when buying or selling.



CHRISTMAS MESSAGE

We take this opportunity to thank all our clients for a very busy year. We hope that the upcoming festive season is well enjoyed by all. We will be closing on the 21st of December 2012 and re-opening on 14th January 2013.

We also wish you and your family the very best for the future and trust that you all get an opportunity to enjoy a relaxing break during the summer.

MERRY CHRISTMAS!

Paul, Eric, Terry, Anne (and all the staff)



If you have any questions about the newsletter items, please contact us, we are here to help.