

# Real.

anderson  
lloyd.

Property Case Law Developments 2022

## Inside:

---

**Sunset clauses in off the plans agreements**

---

**Enforceability of covenants**

---

**Sale of incorrect interest in land**

---

**Long term effect of covenants**

---

**High Threshold for Bad Tenant Behaviour**

---

**Landlord's Motivations in Termination of Lease**

---

**Withholding Consent to Assignable Leases**

---

**Oral Agreement at Auction**



# Welcome to the latest edition of Real., Anderson Lloyd's annual property case law update.

**In this edition we cover a broad spectrum of property related issues including a focus on the enforceability of covenants and their long term effects, sunset clauses in off the plans agreements, bad tenant behaviours and landlords motivations in termination of a lease. We also include information on a case regarding withholding consent to assignable leases and another case on binding contracts at auction and a reminder to exercise caution when executing written sale and purchase agreements.**

We trust the updates will be useful and interesting. If you have any queries, or would like to discuss further, please contact one of our property specialists (details on page 12).



## Latter v Bong

[2022] NZHC 20

**This case considers how a change in circumstances of the properties that enjoy the benefit of a covenant can influence the existence of jurisdiction to extinguish it under s 317(1)(a) of the Property Law Act 2007 (PLA).**

Mr Latter (the Applicant) contracted to sell his residential property. A condition of settlement was the removal of three land covenants registered against the land in 1985. The Applicant sought to extinguish the three covenants under s 317(1)(a)(iii) of the PLA, and contended that there was also jurisdiction under s 317(C)(i) and (ii) of the PLA to extinguish the third covenant.

The changes in circumstances surrounding the first two covenants meant they no longer provided ongoing utility to the owners of the benefiting properties. The first covenant was for the sole benefit of Land Projects Ltd, which was no longer in existence so incapable of taking advantage of the covenant. The second covenant was designed to ensure no caravans or sheds were placed on the property to be used as dwellings. As a dwelling had already been erected on the property, the covenant was deemed to serve no beneficial purpose. Accordingly, the High Court found it appropriate to make an order extinguishing these two covenants under s 317(1)(a)(iii) and just and equitable to make such an order under s 317(1)(a)(f).

The court noted, in its discussion of the third covenant, that failing to oppose the extinguishment application, with knowledge of the material presented to the court, could reasonably be considered a waiver or abandonment of their rights under the covenant. As the owners benefiting from this covenant either omitted to oppose the application or consented to the extinguishment the court found that jurisdiction exists under s 317(1)(c)(i) and (ii) to make the order.

The third covenant purported to preserve the views enjoyed by the benefitting properties, therefore, it had the potential to affect both present and future owners. The court noted that this was an important factor to be considered when determining whether there was jurisdiction under s 317(1)(ii) and (iii) of the PLA to extinguish the covenant. The court found that due to extensive development since the registration of the covenant, the benefitting properties were effectively “immune from the effects of any future development” of the property.

The application was therefore granted and the restrictive covenants were extinguished.



### Key takeaway point:

**When determining whether to extinguish a covenant, the court will consider the utility it continues to provide and will place greater consideration on covenants benefitting both present and future owners.**



# Sunset clauses

*Titterton v Dynasty Capital Limited* [2022] NZHC 1202

**This case decided that a vendor cannot rely on a sunset clause to cancel a contract to sell an off the plans property where the vendor has not complied with its own obligations to progress the development.**

Ms Titterton (the Applicant) entered into a sale and purchase agreement for a land and building package “off the plans” (the Agreement). The vendor purported to cancel the Agreement under a “sunset clause”.

The Applicant had lodged a caveat over the property and sought to sustain it in this application. The “sunset clause” the vendor sought to rely on provided that if the vendor had not obtained Code Compliance Certification for the dwelling by a certain date, either party could cancel the agreement.

The Code Compliance Certification was not obtained by the specified date. The Applicant argued this was due to the vendor’s failure to fulfil their obligation to take reasonable steps to complete construction.

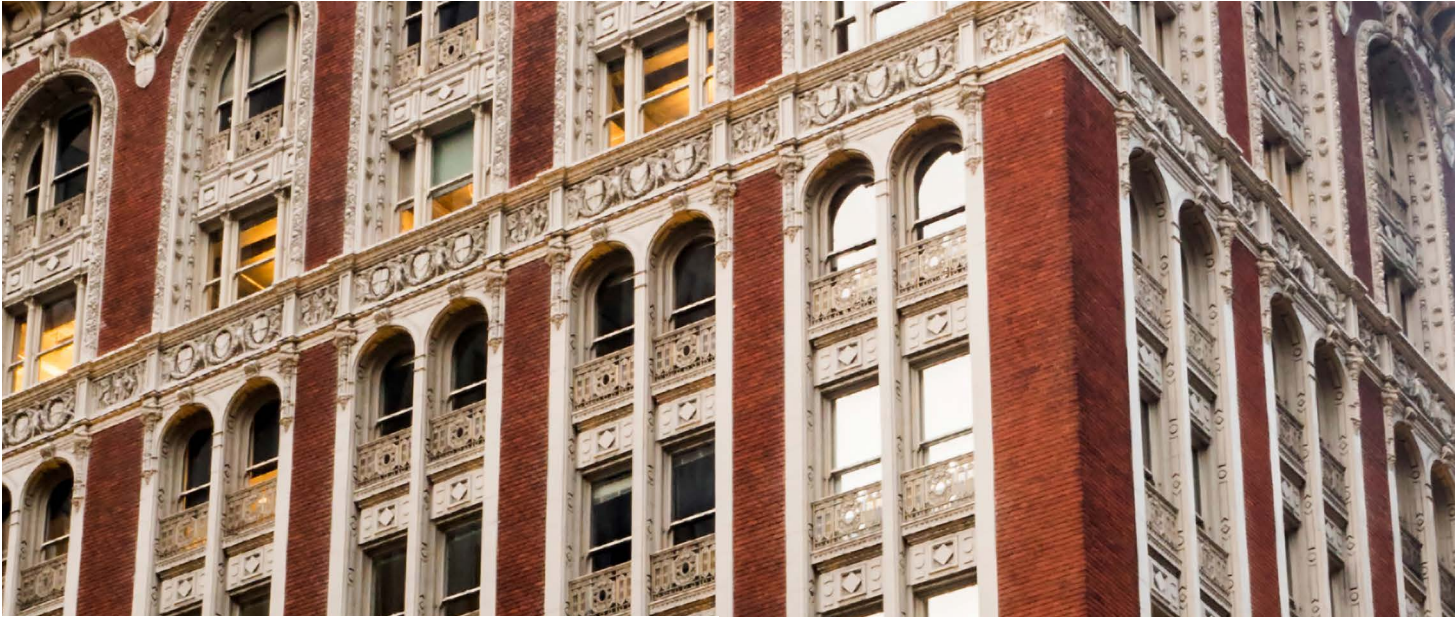
The High Court was satisfied with the Applicant’s argument that the vendor’s omission to complete the build with reasonable diligence excluded them from invoking the “sunset clause” as that “would represent it relying on its own wrong”.

The High Court made an order that the caveat lodged by the Applicant not lapse.



## Key takeaway point:

**A caveat will be sustained in a sunset clause cancellation situation where it is reasonably arguable that the vendor’s contribution to the delay was “material” meaning “a substantial and operating” cause of the delay, as defined in *Melco Property Holdings (NZ) 2012 Ltd v Hall*.**



# Enforceability of covenants

*Landmark Property Holdings Limited v SGA Investments Holdings PTE Limited [2022] NZHC 60*

---

**This case clarified the scope of a positive covenant and discussed the effect of covenants that came into operation before the enactment of the Property Law Act 2007 (PLA).**

---

Landmark Property Holdings Limited (Landmark) owned the three bottom floor retail units of a historic building called Landmark House. The remaining 15 are residential or office units. A covenant was registered over the titles to all of the units in the property requiring that each unit paid an equitable proportion of the outgoings.

Landmark sought to enforce the covenant, in particular, contending that the raising of levies under unit entitlement as fixed by a registered valuer would be inequitable to the retail unit owners and therefore a breach of the covenant. This was due to the greater value of the retail units on a per square metre basis, and the considerably fewer benefits they obtained from the body corporate.

The case turned on whether the covenant was a positive covenant or (in effect) a covenant in gross (which were not permitted at the time of registration of the covenant

in 2004). A positive covenant is established where the covenantor must undertake to do something in relation to the covenantor's land that would beneficially affect the value or enjoyment of the covenantee's land.

The defendants contended this should be limited to physical activities such as pruning trees. The court disagreed and found that the interactions did not have to be purely physical and that expenditure of funds underlies most actions that benefit the value or enjoyment of land.

The court therefore found the covenant to be a positive covenant and enforceable against the defendants.



## Key takeaway point:

**The court will consider both the expenditure of funds and physical interactions with the land when determining whether a covenant is a positive covenant. Accordingly, consideration will need to be given as to whether the obligations contained in the covenant relate to an activity concerning the burdened land, which benefits the benefitting land, and if not, whether a covenant in gross should be used.**



## Sale of incorrect interest in land

*Greymouth Holdings Limited v Lndon*  
[2022] NZHC 641

**This case considers whether a written agreement to purchase a residential property can remain binding so as to sustain a caveat where a fundamental mistake was made by the vendors.**

Greymouth Holdings Limited (GHL) contracted to purchase a freehold interest in a property at 39 Argyle Street, Herne Bay, Auckland (the property). The vendor, the Ariki Trust (the Trust), claimed they made a mistake and had intended to only sell the leasehold interest, not the freehold interest.

The property comprised both freehold and leasehold interests, with the leasehold interest being owned by the Trust. GHL, looking to purchase both interests, entered into an agreement with the owners of the freehold reversion interest to purchase that separately. A few weeks after GHL informed the trust of this agreement, they were presented with a written contract offer from the Trust to unconditionally sell the property as a freehold with vacant possession. When the Trust realised the mistake it refused to settle, prompting GHL to lodge a caveat on the property and apply for specific performance.

The court considered whether GHL had a binding unconditional contract, is potentially entitled to the equitable remedy of specific performance, and whether the

caveat lodged purports to protect the equitable interest claimed. Analysis of whether GHL knew or ought to have known the intentions of the Trust and whether they knew or ought to have known of the mistake was influential in determining whether there was a binding contract.

GHL's argument for specific performance of the written contract is that the Trust had options to acquire the freehold interest, such as taking over their contract for the purchase of the freehold interest. Where this is not possible, GHL argued that they should perform the agreement to the extent they are able, by transferring the leasehold interest at a reduced purchase price.

Although the substantive specific performance proceeding is yet to be heard, the court decided GHL had an arguable claim and sustained its caveat pending the specific performance proceeding being decided.



### Key takeaway point:

**Parties should exercise caution when executing written sale and purchase agreements as the court may not always recognise errors.**



## Long term effect of covenants

*West Hoe Family Trustees Limited v Forsyth*  
[2022] NZHC 2708

**This case clarified the scope of a positive covenant and discussed the effect of covenants that came into operation before the enactment of the Property Law Act 2007 (PLA).**

West Hoe Family Trustees Limited (the Applicants) applied under s 317 of the Property Law Act 2007 (PLA) to extinguish a restrictive covenant lodged in 1986. The covenant was in favour of eight properties nearby and prohibited the use of the burdened land for any trading or commercial purpose except farming or horticulture, and allowed only a single dwelling on the burdened land.

The applicants argued that the character of the area had undergone significant change and urbanisation since 1986 and that the use of the benefitting properties had



seen major change. Therefore, extinguishment of the covenant would not substantially injure the owners of those properties. The court also noted that the covenant impeded the reasonable use of the burdened property to a greater extent than could have been foreseen in 1986.

The court agreed with the applicants on four of the five grounds for extinguishment they submitted and did not find it necessary to determine the fifth. The court accordingly ordered that the covenant be extinguished.



### Key takeaway point:

**The long-term relevance of covenants should be discussed before their registration and considered before purchasing land subject to a covenant or receiving the benefit of a covenant.**



# High Threshold for Bad Tenant Behaviour

*SGAH Investments Limited (SGAH) v Mei Enterprises Limited (Mei) [2022] NZCA 103 (1 April 2022)*

**This case examines the threshold for bad tenant behaviour for the purposes of the court granting relief to a tenant against a landlord's refusal to renew the lease under s 264 of the Property Law Act 2007.**

The Appellant, Mei, took an assignment of lease by consent in 2014 that was renewable for two-year terms, with a final expiry date ten years later. He sought to extend the lease for a further 20 years and brought proceedings in the High Court claiming that the landlord had agreed orally to grant an extension "for as long as the [tenant] wanted".

Disputes arose when the landlord rejected the proposed extension. The tenant tried to pressure the landlord into the agreement by withholding rent and outgoings, issuing a trespass notice against the landlord, and commenced separate proceedings against the landlord's shareholders in relation to an unrelated sale and purchase of a liquor store business. In response, the landlord issued a statutory demand under s 289 of the Companies Act and notice of cancellation of the lease under ss 245 and 246 of the

Property Law Act 2007. It also notified the tenant of its refusal to renew based on rental default and the other alleged breaches. However, the rental default was paid in full an hour before the hearing of the respondent's application to liquidate the appellant and the other breaches were resolved shortly after.

The court held that there was a presumption for relief being granted if the refusal to renew had been based on a tenant's rent arrears and these arrears had since been paid. Exceptionally bad tenant behaviour, such as behaviour containing elements of nuisance, disturbance and damage to neighbouring land, may overturn this presumption. Nonetheless, the court held that in this case the threshold had not been met due to the prejudice the tenant would suffer without relief.



## Key takeaway point:

**The threshold for bad tenant behaviour is quite high to overturn the presumption of relief for refusal of renewal under s 264 Property Law Act 2007. Generally, a singular and remediated act will not meet the threshold. The discretion endowed upon the courts is broad and appellate courts will be hesitant to constrain it.**



# Landlord's Motivations in Termination of Lease

*StorageOne Kapiti (2012) Limited v Sharja Limited [2022] NZHC 2252*

---

**This case considered the relevance of a lessor's motivation in refusing to renew a lease.**

---

The appellant, StorageOne, sought relief under s 264 of the Property Law Act 2007 in relation to a failure to renew its lease of commercial property with the respondent, Sharja. The lessee (being StorageOne) overlooked giving a renewal notice but the parties continued to act as if the lease was still on foot.

Following this, disagreements arose between the parties regarding the lessee's adherence to the lease terms. The lessor gave notice of termination of the periodic tenancy which it said had commenced when the lessee failed to give notice to renew its original lease.

The court held that while the lessee had breached the lease, it was not enough to warrant the cancellation of

the lease. This was evidenced by the fact that the lessor had no objections to keeping the lessee as a tenant and had presented a new contract that made no stipulations regarding remediating the breaches. Instead, the new contract focused on increased rent. The court described this as a case where the lessor sought to take advantage of the lessee's mistake to secure a better deal. The court elected to grant relief to the lessee.



## Key takeaway point:

---

**In ascertaining an application under s 264 of the Property Land Act, the court will have regard to the objectively ascertainable motivations of the parties. It may consider the content of subsequently proposed contracts and the behaviour of the parties to determine whether to grant relief.**



# Withholding Consent to Assignable Leases

*Reid v Estreich [2022] NZHC 1433*

---

**This case concerned how the court ascertains damages that result from a landlord unreasonably withholding consent in the assignment of a lease.**

---

The First Plaintiffs, Geraldine and Brandon Reid, held an assignable 999-year lease over freehold land owned by the Defendant, Stephen Estreich. The First Plaintiffs decided to sell their leasehold interest to the Second Plaintiffs, being their son Elias and his wife Heeni Reid.

In August 2021, the First Plaintiffs gave formal notice to the defendant that they wished to assign the lease and provided him with consent documents. The Defendant wanted to sell the freehold title instead and informed them that he did not intend to grant consent to the assignment.

In October 2021, the Second Plaintiffs received a limited-time loan offer from a bank to fund the purchase of the lease. The Defendant continued to withhold consent and as a result, the Second Plaintiffs did not draw down the bank loan in time and the offer expired.

After the High Court proceeding commenced, the Defendant granted consent. The Plaintiffs sought damages to the sum of NZ\$5,920 based on the new, increased mortgage rate (from 3.45% to 4.19% per annum for the first two years of the mortgage). The court held that it is unreasonable for a lessor to refuse consent if the grounds do not reasonably relate to the consent request. The courts awarded this sum on the basis that the Plaintiffs would not have suffered the additional interest costs had the Defendant consented within a reasonable time.



## Key takeaway point:

**In the absence of a legitimate reason, a landlord cannot withhold consent to an assignment lease. The landlord must give consent within a reasonable timeframe to avoid being liable for any damages resulting from the delay.**

# Oral Agreement at Auction

*Sutich v Granich [2022] NZHC 698*

---

## This case focuses on whether an oral agreement between a home buyer and the real estate agent in the context of an auction can form a binding agreement

---

Mr Sutich attended the auction of Mr Granich's residential property. The auction fell through but Mr Sutich claimed he reached a binding agreement with Mr Granich shortly after the auction to buy the property for \$1.85 million. Mr Granich denied there was a binding agreement. Instead, he had signed a contract to sell the property to another individual some days after the auction for \$1.95 million. Mr Sutich lodged a caveat and Mr Granich applied to lapse the caveat. Mr Sutich applied for an order that the caveat not lapse, which was the focus of this judgement.

The argument of there being a binding agreement as proposed by Mr Sutich was based on talks that occurred shortly after the auction. Mr Sutich alleges that the real estate agent, Mr Mozessohn, had told him that Mr Granich was willing to lower the reserve to \$1.85 million (down from \$1.9 million) and if he would agree to pay that amount "we would have ourselves a deal". Mr Mozessohn disputes this. Mr Sutich also relied on a partially signed written agreement, reflecting the alleged oral agreement. This written agreement had been presented to Mr Granich but he had not signed it.

The court held that there are two ways that Mr Sutich could have formed a binding contract for the sale and purchase of the property at auction. The first would have been by being the highest bidder above the reserve and the auctioneer accepting the bid by the fall of the



hammer. The second would have been by the auctioneer lowering the reserve and accepting a bid above the reserve over the next working day. The court held that there is no evidence of either of these having occurred. It stressed that the real estate agent performed a different role to the auctioneer, and so the alleged conversation would have fallen short of the requirements in any case. As the court held that no binding contract was formed in the first place, it did not analyse whether the contract would have met the requirements of s 24 of the Property Law Act.

Mr Sutich also argued that the doctrine of part performance applied. Generally, contracts for the disposition of land must be in writing and must be signed by the person against whom the contract is enforced in order for them to be binding. Where these requirements are not met, the court may apply the equitable doctrine of part performance. In particular, he argued that he tried to pay the deposit but was thwarted by the real estate agency's refusal to accept it. However, the court held that the elements of the doctrine were not made out. Firstly, it held that no binding contract, oral or written, had been formed. Secondly, it also held that the attempt to pay the deposit does not amount to part performance even if there had been a contract.



### Key takeaway point:

---

**The rules regarding the formation of a binding contract at auction are strict. Talks with real estate agents are unlikely to hold much weight unless clearly agreed upon by both parties. An attempt to pay a deposit is unlikely to amount to part performance.**

## Our Property team



**Robert Huse**  
Partner, Queenstown  
  
p: 03 450 0746  
robert.huse@al.nz



**Mike Kerr**  
Partner, Christchurch  
  
p: 03 335 1256  
mike.kerr@al.nz



**Sharon Knowles**  
Partner, Dunedin  
  
p: 03 467 7178  
sharon.knowles@al.nz



**Kerry O'Donnell**  
Partner, Queenstown  
  
p: 03 450 0729  
kerry.odonnell@al.nz



**Clare O'Shea**  
Partner, Auckland  
  
09 338 8304  
clare.oshea@al.nz



**Vanessa Robb**  
Partner, Dunedin  
  
p: 03 471 5430  
vanessa.robb@al.nz



**Dan Williams**  
Partner, Auckland  
  
p: 09 338 8320  
dan.williams@al.nz



**Greg Smith**  
Special Counsel, Christchurch  
  
p: 03 335 1218  
greg.smith@al.nz

**Anderson Lloyd has specialist expertise in all aspects of commercial property law. Our clients include commercial property investors, institutional landlords, financiers, local authorities, national franchises, Government and Crown-owned entities, local authorities and owners and developers of retail premises and retirement villages.**

**Our commercial property expertise includes:**

- property due diligence
- acquisitions and divestments
- commercial leasing
- property syndication
- subdivisions
- Building Act and regulatory compliance
- Public Works Act matters
- advising on Overseas Investment Act applications

**Anderson Lloyd also has a highly experienced residential property legal team that can expertly advise on all residential property matters.**

**Our residential property lawyers are experts in:**

- buying and selling residential property including family homes, retirement village units and apartments
- leasing matters including contracts
- conveyancing law
- general property issues, including easements, covenants and subdivisions

### Want to know more?

If you have any questions about Property Law, please contact one of our specialist team above or check us out at [al.nz](http://al.nz)