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Real.

Property Law Developments Spring 2023

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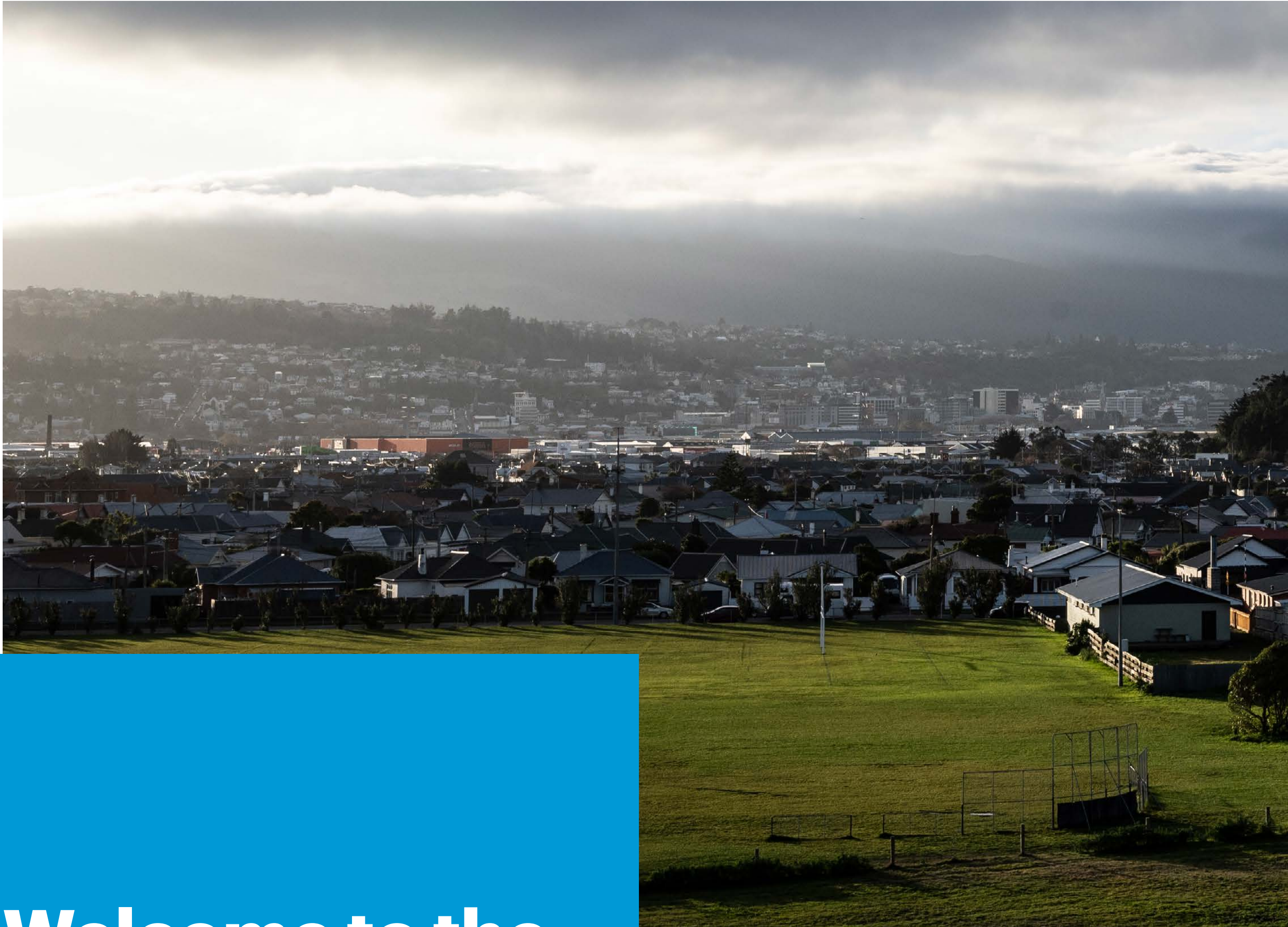


Welcome to the latest edition of Real. which we hope you will find informative and interesting.

Our regular case commentaries have been well received by our clients and over the next few newsletters we will widen our offering to include some of our work highlights, thoughts on developments in the property sector and articles commenting on areas of interest including new legislation.

With seven partners and thirty-six authors, the Anderson Lloyd Property Team is one of the largest in New Zealand with teams across four locations working collaboratively to give our clients the best possible legal and strategic advice. We are proud of our team and the wide span of property-related expertise we offer.

Our work highlight focuses on the sale of the property known as "Mt Iron" in Wanaka to the Queenstown District Council, led by Kerry O'Donnell, chair of the Anderson Lloyd Partnership based in our Queenstown office. The resulting preservation of an iconic property for the wider community was an honour to be involved with for the team.

You will also see the assistance given by Anderson Lloyd to New Zealand Green Investment Finance with the development of a New Zealand climate clause bank – publicly available with a link to it in our newsletter. We have also provided a summary on the draft Auckland Council Future Development Strategy. With the challenges facing our largest city, this is an important piece of work, with feedback on submissions being considered currently.

On the case and legislative front, this edition includes a summary of the recent changes to the Auckland District Law Society's Sale and Purchase Agreement standard terms as a consequence of the recent amendments to the Unit Titles Act, a case testing the reasonableness of a restrictive covenant and two recent cases canvasing whether a caveat was justifiably lodged. The Court's decision in TADD Management v Weine gives a cautionary tale on the provision of seismic assessments in the pre-contractual material, and their effect where disclaimers were provided.

With on-going challenges including the current state of the economy, the impact of weather-related events and the election in October, we expect to see on-going legislative changes affecting the sector.

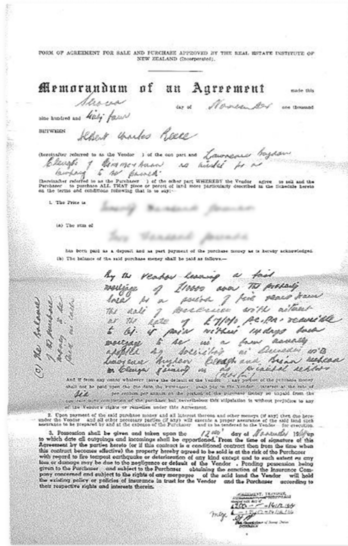
If there is anything our Team can do to assist you with your property needs, please don't hesitate to make contact.

Nga mihi

Sharon Knowles
Head of Department

Mt Iron Sale

Anderson Lloyd has recently completed the sale of the iconic property that is "Mt Iron" and "Little Mt Iron" on behalf of a client, which sees the guardianship of this special property passed from Allenby Farms Limited (Allenby) to the local council.



FORM OF AGREEMENT FOR SALE AND PURCHASE APPROVED BY THE REAL ESTATE INSTITUTE OF NEW ZEALAND (Incorporated).

Memorandum of an Agreement made this day of one thousand nine hundred and

BETWEEN

(hereinafter referred to as the Vendor) of the one part and

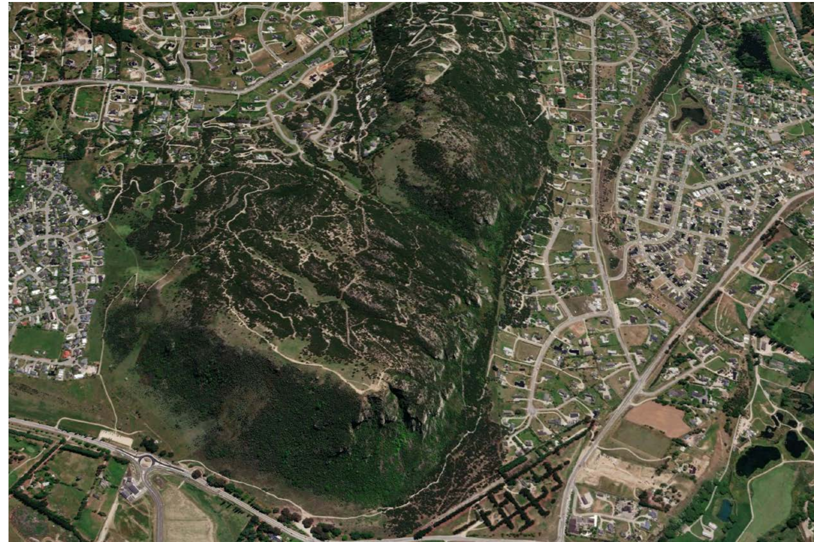
(hereinafter referred to as the Purchaser) of the other part WHEREBY the Vendor agree to sell and the Purchaser to purchase ALL THAT piece or parcel of land more particularly described in the Schedule hereto on the terms and conditions following that is to say:—

1. The Price is

(a) The sum of

has been paid as a deposit and as part payment of the purchase money as is hereby acknowledged.

(b) The balance of the said purchase money shall be paid as follows.—



Allenby had originally purchased the Mt Iron property in late 1964 – also with the assistance of Anderson Lloyd. Records show that Laurie and Brian Cleugh of Allenby Farms purchased the land from Welsh farmer Herbert Reece on 7 November 1964, with Anderson Lloyd noted as the purchaser's solicitors. Now nearly sixty years later, full circle has come, with the AL legal team assisting with the sale to council which was completed in late May 2023.

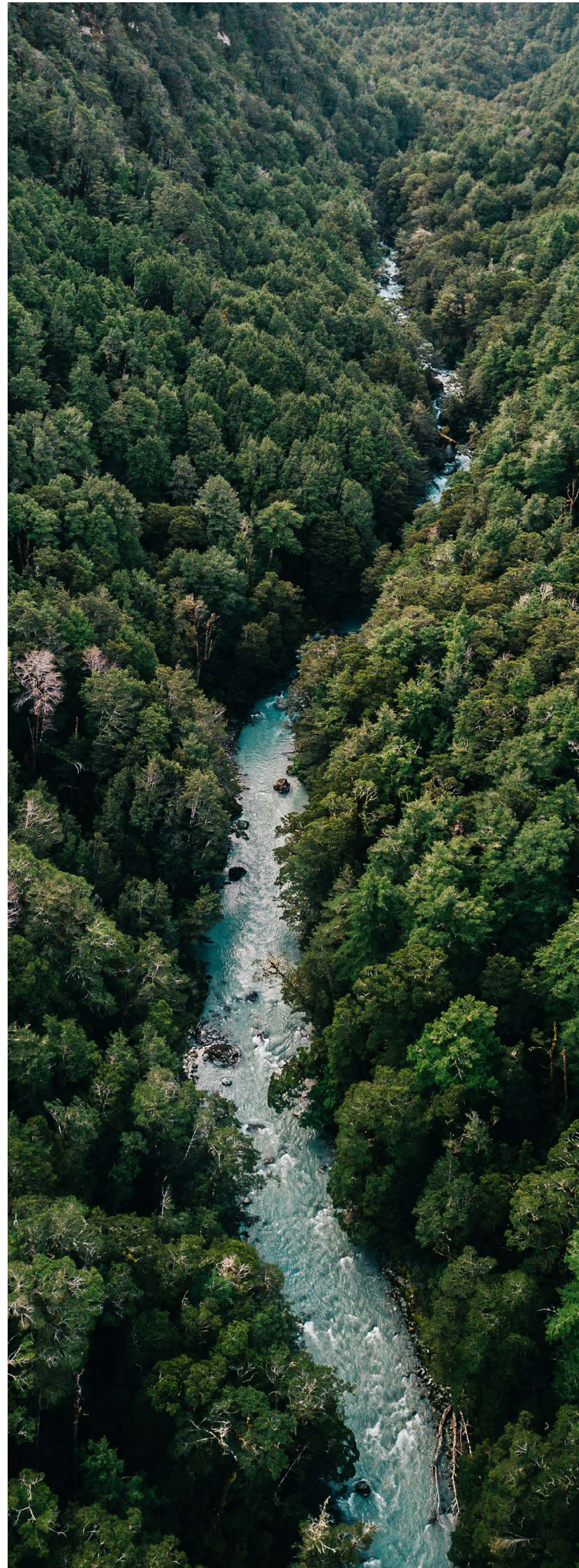
Kerry O'Donnell, partner in Anderson Lloyd's Queenstown Property team and lead Partner on this deal, said it was great to assist Allenby on this sale for a number of reasons.

"Firstly it has always been great to work with Allenby, a generational family company client, whom AL has worked with for many decades – AL is proud of its long association with the family, and was thrilled to be asked to work again on this significant sale.

Secondly, the property itself, which Allenby had seen itself as the guardian of since the 60s, is now safely in community hands. Allenby had spent countless hours over the years keeping the property free of weeds and wilding pines, while keeping access open for up to 180,000 walkers through the property per year. Allenby was clear at the outset that the on-going community access and management of the property was a key component to the deal proceeding. We worked closely with Allenby to ensure that the property would be secured as a community asset, and managed by Queenstown Lakes District Council (QLDC) as a public reserve."

The deal, which took more than 2 years to negotiate, reach agreement and settle, sees 67ha on the north, west and southern flanks of Mount Iron and land running along State Highway 84, plus an additional 27ha centred on Little Mount Iron transferred to Council ownership and held as reserve for community use.

Kerry O'Donnell
Partner, Queenstown



Climate clauses

New Zealand climate clause bank

Anderson Lloyd is proud to have assisted New Zealand Green Investment Finance by contributing to the development of a New Zealand climate clause bank. This clause bank is a free resource to be utilised by organisations who wish to include climate-friendly clauses into their contracts. Anderson Lloyd specifically assisted with the drafting of the provisions to be used in commercial leases.

This clause bank builds on the work of the Chancery Lane Project, which is the largest global network of lawyers and business leaders using their expertise to prepare climate clauses to help their clients drive better climate outcomes in their contractual dealings.

The clause bank is publicly available at the following website:

nzgif.co.nz/investing/new-zealand-climate-clause-bank/

Pearlfisher Trustee Limited v Mega Capital Group Limited

[2023] NZHC 994

This case considers the validity of an agreement to mortgage and whether it establishes a caveatable interest.

Pearlfisher Trustee Limited (**Pearlfisher**), a non-bank lender, agreed to provide developer Mega Capital Group Limited (**Mega**) a loan for a large residential development at 221 Jesmond Road, Drury (**Property**). Pearlfisher prepared, signed and sent documentation to Mega. This documentation included an indicative offer, a formal offer and a property finance facility agreement.

The facility agreement included a right for Pearlfisher to register a mortgage as well as a requirement for Mega to pay "arrangement" and "establishment" fees. Mega attempted to re-negotiate the fees, specifically removing the arrangement and establishment fees, however when this was unsuccessful, Mega counter-signed the documents and returned them to Pearlfisher.

Mega eventually informed Pearlfisher that they were no longer proceeding with the loan. However, the arrangement and establishment fees and other costs remained outstanding. Pearlfisher served Mega with a statutory demand for $627,699.26, representing the outstanding amount, and registered a caveat on the property on the grounds that Pearlfisher had an equitable interest in the Property arising from the loan documentation. Mega applied to lapse the caveat and Pearlfisher applied to the High Court to sustain the caveat.

The Court found that Pearlfisher did have a caveatable interest in the land. Mega attempted to argue that there was no valid agreement to mortgage to sustain a cavetable interest. The Court disagreed, finding that was a valid agreement to mortgage as Pearlfisher's commitment to advance the funds was sufficient consideration to make the agreement binding. Further, the various offers provided by Pearlfisher, that were agreed to and signed by Mega, along with the facility agreement stated that the fees were payable whether or not the funds were advanced. Therefore, Mega's attempt to unilaterally cancel the loan was not effective and the loan documentation remained binding.

The Court also found that the other grounds of opposition raised by Mega were not feasible for the following reasons:

- there were inconsistencies between Mega's claim for reduced fees and the loan documentation;
- there was no abuse of process by Pearlfisher as it was Mega who initiated the proceedings; and
- the caveat was not defective as the loan documents were completed and binding and the terms of the loan documents created an agreement to mortgage which supported a caveatable interest.

The Court then decided to not exercise its residual discretion to remove the caveat or allow it to lapse as it was not completely satisfied that the removal of the caveat would not prejudice Pearlfisher's legitimate interest under the agreement to mortgage.

Key takeaway point:

The Courts are likely to sustain a caveat where it includes a valid agreement to mortgage which contains sufficient consideration from the lender, notwithstanding that loan funds have not been advanced.

Auckland's future development strategy

Auckland Council (Council) has recently prepared a draft Future Development Strategy (FDS) to set out the vision for the growth of Tāmaki Makaurau over the next 30 years.

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Due to the exponential growth of Tāmaki Makaurau coupled with the uncertainty created by recent events such as COVID, flooding and climate change, Council is keen to reconsider how Aucklanders live and the impact this has on society and environmental well-being, both in the short and long-term.

The FDS is also driven by the National Policy Statement on Urban Development 2020 (**NSP-UD**) which requires councils to ensure that there is at least sufficient housing and business development capacity to meet demand over the next 30 years.

The FDS looks to achieve four things:

1. make Auckland an interconnected living system;
2. achieve quality living environments;
3. address disparities in communities and investments; and
4. have resilient built systems, natural environment and communities.

To achieve these goals, the FDS proposes to:

- focus future growth in existing urban areas where people choose to live and are closer to town centres whilst limiting growth on undeveloped land in the city fringe;
- prioritise infrastructure investments over the next 30 years. Certain priority will be given to infrastructure investment in the following areas for the first 10 years of the FDS:
  - Auckland Housing Programme priorities in Mt Roskill, Māngere and Tāmaki;
  - the city centre;
  - Westgate; and
  - Drury- Opāheke area.
- make the best use of existing business land by safeguarding it and managing the supply of different types of future business land, ensuring opportunity, flexibility and choice over the long-term.

The consultation process with Aucklanders ended on 31 July 2023. From August to September 2023 feedback from public and local boards will be considered and changes will be made to the FDS. In late 2023 the Planning, Environment and Parks Committee will request adoption of final FDS document.

Once the FDS is finalised, Council will seek to develop a comprehensive implementation plan in accordance with the NPS-UD requirements. This will then replace parts of the existing Auckland Plan 2050, the Development Strategy 2018 and the Future Urban Land Supply Strategy 2017. It is then intended that this implementation plan will then be reviewed annually and updated as required.

Unit Title updates

The Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Act (UTAA) came into force on 9 May 2023.

While the UTAA makes some general changes to body corporate management, the more material and practical changes relate to the disclosure regime. Specifically, the UTAA requires a wider range of information to be provided to purchasers in the pre-contract disclosure statements (**PCDS**) and pre-settlement disclosure statements (**PSDS**).

The additional information to be disclosed in the PCDS includes:

- financial statements;
- a copy of the long-term maintenance plan;
- any audit reports for the previous three years, along with general meeting minutes and committee meeting minutes during this period; and
- whether the body corporate or body corporate committee has actual knowledge of any known defects, including weather-tightness issues, earthquake-prone issues and any other significant defects in the land or the unit title development that may require remediation.

The additional information to be disclosed in the PSDS includes:

- details of the body corporate manager; and
- details around insurances.

The UTAA also provides various delay and cancellation rights to the purchaser where a complete and accurate PCDS/PSDS is not provided five working days before the settlement date. The process to be followed in such circumstances is as follows:

- where the PCDS is not provided within the required timeframe, the purchaser can elect to:
  - delay settlement to the fifth working day after a complete and accurate PCDS is provided; or
  - cancel the agreement where the vendor does not provide the complete and accurate PDCS within 10 working days of the purchaser giving the vendor notice of its intention to cancel;
- where an incomplete or inaccurate PCDS is provided or where the vendor fails to provide a PCDS at all, the purchaser may delay settlement by five working days until a complete and accurate PCDS is provided (provided that the purchaser notifies the vendor that the PCDS is complete and accurate).

The process a purchaser can follow where a PSDS is not provided within the required timeframe is as follows:

- the purchaser can elect to:
  - delay settlement until the fifth working day after the date the vendor provides a complete and accurate PSDS; or
  - notify the vendor of the purchaser's intent to cancel the agreement. The vendor then has 10 working days to provide a PSDS. If the vendor:
    - provides a PSDS within the required timeframe, then the purchaser cannot cancel the agreement; or
    - does not provide a PSDS within the required timeframe, then the purchaser can either cancel the agreement or proceed with the agreement, with settlement being five working days after they advise the vendor that they wish to proceed.

The UTAA has also resulted in changes to the widely used Auckland District Law Society/Real Estate Institute of New Zealand template agreement for sale and purchase of real estate (**SPA**). Specifically, there are four key changes to the SPA that relates to the UTAA:

- the vendor warranty which states that the information contained in the PCDS is complete and correct (contained in clause 8.2(1) of the SPA) is now limited to the extent required by the Unit Titles Act (**UTA**);
- an additional obligation is placed on the vendor to provide a certificate of insurance and a PSDS not less than five working days before the settlement date (clause 8.3);
- the vendor warrants that the other than contributions to the operating account, long-term maintenance fund, contingency fund or capital improvements fund that are shown on the PSDS, there are no other amounts owing by the vendor under the UTA (clause 8.4); and
- the SPA and UTA are tied together by expressly confirming that if the purchaser elects to settle where the vendor has failed to complete the PSDS, the purchaser waives their delay and cancellation rights under the UTA or otherwise.

Key takeaway point:

A number of changes have been made to the Unit Titles regime, particularly around the disclosure requirements. The standard ADLS SPA has been amended to reflect these changes.

Hürlimann v Lilley

[2023] NZCA 173

This case considers whether the court has discretion to modify or extinguish land covenants if they had been reasonably consented to.

The Appellant, Mr Hürlimann, agreed to purchase a lifestyle property in Mr and Mrs Lilleys' four lot subdivision. Clause 23 of the agreement provided that prior to settlement the Lilleys would not register any land covenants over the property without Mr Hürlimann's consent and he could cancel the agreement if he did not consent.

The Lilleys provided Mr Hürlimann with proposed restrictive covenants to provide for design requirements and that only a new residential home could be built on the property. Mr Hürlimann sought advice from his lawyer and approved the registration of the first set of covenants.

In the lead-up to settlement the relationship between the parties deteriorated when the Lilleys proposed the registration of a second set of covenants, which would prevent any dwelling being built on the property.

Following settlement, Mr Hürlimann then issued proceedings in the High Court seeking declarations for both sets of restrictive land covenants. The Lilleys then elected not to register the second set of covenants.

Mr Hürlimann argued the agreement did not allow the registration of the covenants, he was under duress when he agreed to the first set of covenants due to pressure from the Lilleys and that the Lilleys had engaged in an abuse of discretionary contractual power. Mr Hürlimann sought an order under section 317 of the Property Law Act 2007 to extinguish the covenants. The Court ruled against Mr Hürlimann on all his arguments.

Mr Hürlimann appealed to the Court of Appeal on the grounds the High Court was wrong in refusing to exercise its power under section 317 of the Property Law Act 2007 and that is was "just and equitable" for the Court to extinguish or modify the land covenant.

The Court reviewed the two-step approach in *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657 which is commonly adopted in assessing whether to vary land covenants under section 317. The Court was satisfied there was no error in the High Court's approach to its application of section 317.

Mr Hürlimann also argued the restrictive covenants were inherently inequitable and arbitrary, as the Lilleys had not registered any restrictive covenants against the other titles created by the subdivision, and the Lilleys imposed the covenants for a collateral purpose – to force him to cancel the agreement to purchase the land.

The Court rejected these arguments and stated the Lilleys were free to deal with the remaining lots however they saw fit and that Mr Hürlimann had expressly agreed to the covenants being registered against his title. The Court noted he had every right to cancel the agreement under clause 23 but elected to continue with the purchase.

The Court dismissed the appeal and allowed the restrictive covenants to remain on Mr Hürlimann's title.

Key takeaway point:

A buyer that consents to the registration of land covenants and receives legal advice throughout the process is unlikely to find sympathy with the Court to then apply to vary those previously approved land covenants.

Jiang v Highrise Apartments Ltd

[2022] NZHC 249

This case considers whether a contract prepared by lay-people created a caveatable interest and the difference between an equitable charge and an equitable mortgage.

Mr Jiang entered into a joint venture arrangement with Ms Liang and Mr Gao (the **Gaos**) to develop land in Glen Eden and Mount Roskill in Auckland and entered into a loan agreement for Jiang to provide the Gaos with a loan. Under the loan agreement the properties at 2/239 Glenfield Road and 2/1 Claude Brookes Drive, Henderson (**Properties**) were provided as security by the Gaos and gave Jiang the right to sell the Properties and lodge a caveat if the loan was not repaid. The Gaos were also required to obtain Jiang's consent before they sold the Properties. While the loan agreement was not drafted by lawyers, it did include terminology such as "mortgage" and "mortgaged property" in it.

Following the end of the joint venture, the Gaos were unable to repay the loan due to a dispute over the accuracy of the loan accounts. Jiang claimed that there were considerable amounts outstanding and subsequently lodged a caveat over both the Properties. The Gaos entered into two sale and purchase agreements for the Properties, one with Highrise Apartments Limited (**Highrise**) for 2/239 Glenfield Road, and the other with GL Group Limited (**GL**) for 2/1 Claude Brookes Drive. Mr Jiang did not give his consent to the sale of the Properties.

Highrise and GL made applications to lapse the caveat. Jiang applied to the High Court to sustain it. There were two issues raised in the proceedings: firstly whether Highrise and GL had standing to lapse the caveat, and secondly, whether the caveat should be lapsed.

The Court found that Highrise and GL did have standing to apply to lapse the caveat under section 143 of the Land Transfer Act as they had a real and genuine interest in an instrument that would affect the Properties. While the Gaos were in breach of the loan agreement by selling the Properties without Jiang's consent, the Court did not consider this affected the standing of Highrise or GL, but rather it was relevant to the amount of damages that would be awarded.

The Court then went on to consider whether Jiang had reasonably argued that he had a caveatable interest, specifically, whether the loan agreement granted Jiang more than the right to lodge caveats over the Properties. The Court found that Jiang did have an equitable interest in the Properties due to the wording used in the agreement. The ordinary meaning of the words "security", "secure", "mortgage" and "mortgaged property" led the Court to conclude that it was reasonable to argue that Jiang was granted an equitable charge or mortgage over the Properties. The Court also noted that the agreement explicitly conferred the right to Jiang to sell the Properties if the Gaos failed to repay the loan and interest.

The Court decided to not exercise its residual discretion to remove or lapse the caveat as the removal would prejudice Jiang by placing the onus on him to sue the Gaos for the money, rather than the Gaos being required to tender payment to secure the withdrawal of the caveat.

Key takeaway point:

The wording of a loan agreement is important in determining whether a caveatable interest and an equitable charge / mortgage has been created.

The Gama Foundation v Fletcher Steel Limited

[2023] NZCA 243

In this case, the Court of Appeal considered whether a landlord has the right to demand full repayment of all repair costs incurred after a failure by the tenant to reinstate the premises following the expiry of the lease.

At the expiry of a 10-year lease, the tenant, Fletcher Steel Limited (**Fletcher Steel**), was in breach of several repair and maintenance covenants. The landlord, The Gama Foundation (**Gama**), claimed in an arbitration for $1.75m in repair costs following expiry of the lease to reinstate the premises. Fletcher Steel accepted liability for $900,000 of those costs but denied liability for the balance. The arbitrator found that Fletcher Steel was liable for an additional $320,000 but not the full amount. Gama appealed the arbitrator's decision to the High Court. The High Court declined leave to appeal, but the Court of Appeal granted special leave to hear the appeal.

Gama argued the arbitrator incorrectly applied the relevant legal test in Joyner v Weeks. The rule in Joyner has two propositions:

- the fact a landlord has not and will not incur the cost of performing the lessee's repair obligation does not preclude a claim for damages; and
- the measure of damages is the usual contractual measure, namely the landlord must prove it is a reasonable and proper amount for putting the premises into the state of repair they ought to have been left in.

Gama argued that the steps it had taken to repair the premises were in mitigation of damages caused by the tenant and were therefore recoverable, and that Fletcher Steel should have to prove that the costs incurred by it were unreasonable.

The Court found the steps taken by Gama may have mitigated consequential loss (such as lost rent), but the arbitrator was correct to find that the amount recoverable was the costs of repair work Fletcher Steel had been obligated to carry out but had not. The Court found it is on the landlord to prove its damages. The Court rejected a position where a landlord could claim costs in "mitigation" where it would result in an entitlement to costs exceeding provable damages.

The Court of Appeal dismissed the appeal.

Key takeaway point:

When landlords are undertaking remedial repair works, they need to ensure they carefully consider what costs may and may not be claimable from a tenant.

Tadd Management Limited v Weine

[2023] NZHC 764

In this case the High Court considered the liability of a vendor to a purchaser where a New Building Standard (NBS) rating used in marketing materials turned out to differ substantially from a later assessment.

The property in question was a commercial building owned by the Ruth Weine Family Trust (**Vendor**). The marketing materials for the property included an ISA and accompanying letter from New Zealand Consulting Engineers Limited (**NZCEL**) which assessed the building as having a 60% NBS Rating.

Following purchase at auction, Tadd Management Limited (**TADD**) had two independent companies provide a second opinion on the NBS rating. Both returned results significantly lower than 60% NBS rating and indicated that the building met the definition of an earthquake-prone building under the Building (Earthquake-prone Buildings) Amendment Act 2016. TADD claimed there had been a contractual misrepresentation by the Vendor.

The Court found in favour of TADD. The ISA was found to have been presented by the Vendor as a statement of fact not as a statement of opinion. The Court highlighted the Vendor's failure to provide context for the ISA or explain the limited nature of an ISA in marketing the property. Statements from the Vendor and NZCEL that the NBS of 60% was a 'good rating' and that 'further analysis or a DSA would probably return an NBS exceeding 70%' also contributed to the Court's finding. Any disclaimer the Vendor had provided in relation to the ISA failed to address the specific property at hand and, therefore, did not limit their liability for misrepresentation.

The Court also considered the Vendor's claim against NZCEL for negligence, breach of contract, or breach of the Fair Trading Act 1986. The Court found that, while the NBS rating was later found to be incorrect, NZCEL had prepared the ISA with reasonable skill, care and diligence, and in doing so absolved itself of any liability.

Key takeaway point:

Vendors should take care in the representations they make about a property to prospective purchasers. If providing third party reports with marketing material a vendor should make sure to emphasise to the purchaser that any report is for information purposes only and set out the limitations that may apply to any such report. Appropriate limitations should also be included in the Agreement for Sale and Purchase.

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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

This publication is intended only to provide a summary of the subject covered. It does not purport to be comprehensive or to provide legal or tax advice. No person should act in reliance on any statement contained in this document without first obtaining specific professional advice. If you require any advice or further information on the subject matter of this publication, please contact the partner/solicitor in the firm who normally advises you.

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**