

Edition 6 | July 2024

Real.

Property Law Developments | Winter 2024

anderson
lloyd.

Inside this issue:

Project Titan

Changes to Brightline

Queenstown Trails Trust

Re Fairview Estate Investment Limited

Re Feng

Whakaruru v Bath

**AGD Trustee Limited v Millbrook
Country Club Limited**

**Residential Tenancies Amendment Bill 2024
passes first reading**



Welcome to our winter version of the Real magazine, we trust you will enjoy the varied content on matters that we hope are of interest to our many clients in the property sector.

The Anderson Lloyd property team have the privilege of working with our clients on many interesting and significant projects.

Our Queenstown team continues to advise the Queenstown Trails Trust on the development of the world class trail network in the Wakatipu basin. Canvassing Anderson Lloyd's involvement in the process, we outline the latest developments involving many landowners, the Queenstown Lakes District Council and the Whakatipu community.

New Zealand is seen as one of the best places in the world to farm poultry, and our Auckland team recently assisted a subsidiary of Silverfin Acquisitions Limited to acquire two large scale poultry farms in the Waikato region with Inghams Enterprises (NZ) Pty acquiring the hatchery business. We explain the deal and the complex wider project in this magazine. Anderson Lloyd was able to assist to bring together all of the moving parts to a successful outcome.



With a change of government a raft of changes are proposed which are intended to ease some of the pressure in the property sector on various fronts in the current tough economic environment. The brightline rule has reverted from 1 July 2024 to a 2-year test with extension of relief in certain associated persons transfers and we comment in more detail on the changes. Changes are also proposed to the Residential Tenancies Act which will allow landlords to again terminate leases without justification. The proposed changes are outlined, which have been put out for public consultation and are now being considered for reporting back to parliament at the end of the year.

Slowing of the residential property market and dropping prices in some areas are having a significant effect where a purchaser fails to settle. Our case commentaries include the Court awarding significant damages against defaulting purchasers where a vendor subsequently sells the property at a lesser price than the original contract provided for.

Thanks to you all for your support of Anderson Lloyd and the Property team, we appreciate all the instructions and relationships we have with our clients and other professionals. If there is anything we can do to assist you with your property needs please don't hesitate to make contact.

Ngā mihi

Sharon Knowles

Head of Department





Project Titan

Anderson Lloyd’s Auckland Property team, led by Dan Williams, has recently assisted Silverfin Acquisitions Limited’s subsidiary Silverfin Nominees (Inghams Hatchery) Limited to acquire two large scale poultry farms, being approximately 44.56 hectares in total, in the Waikato region, from Bromley Park Hatcheries Limited.

Silverfin is a property syndication company with over \$575 million of funds under management. The current acquisition, which also involved Inghams Enterprises (NZ) Pty simultaneously acquiring the hatchery business from Bromley Park Hatcheries Limited and being granted long term leases of the hatcheries by Silverfin, marked Silverfin’s third partnership with Inghams.

The nature of the arrangement was complex, with a tripartite deed negotiated and entered into by all parties to manage the numerous moving parts involved. The deal also involved a wholesale investment scheme which provided investors with the opportunity to invest in one or more of the 470 interests of \$50,000 in the scheme, providing an estimated initial return to investors of 7.5% per annum after tax. The balance of the purchase price was made up of debt funding.

It was great to be able to work with Silverfin on all aspects of the transaction, and assist Silverfin with the next step in its longstanding relationship with Inghams. The latest transaction added assets worth nearly \$30 million to its existing poultry-related property portfolio which already included a processing plant, a hatchery and poultry farms worth \$120 million in the Waikato.

With New Zealand being recognised as one of the best places in the world to farm poultry, the deal is set to support and secure the growth in chicken consumption in our domestic market.



Changes to Brightline

As announced by the New Zealand Government, the Bright-line Rule will revert to its original form, being the 2-year test.

If you sell a property on or after 1 July 2024 the bright-line property rule will only apply if the property is sold within 2 years of purchasing it, rather than the outgoing 5 or 10 year periods.

It is important to note that the bright-line date is not the date on which settlement occurs but will usually be the date when the vendor enters into an agreement for sale and purchase. For example, if an agreement is entered into on 5 June 2024 with settlement after 1 July 2024, it will still be subject to the existing bright-line rules, not the new 2-year test.

Main Home

Generally, the bright-line property rule does not apply to the sale of your main home, and this will not change. However, the criteria for the main home exclusion will be as follows:

You must:

- use more than 50% of the property's area as your main home.
- use the property as your main home for more than 50% of the time you owned it.

If you have built on the land, the construction period will not be included when determining the usage qualifiers under the main home exclusion.

Rollover Rules

Under the bright-line rules, there are special rollover relief rules that apply for certain transfers of residential property to and from family trusts where the bright-line tax does not apply. Previously this relief was very limited and complex.

The rollover relief rules will be extended to apply to "associated persons transfers". This will mean that transfers that were previously subject to the same bright-line treatment as a third-party, will now include to transfers:

- between associated companies, or between a person and an associated company;
- between relatives (within 2 degrees of relationship);
- between trusts and settlors, beneficiaries, and related trusts;
- between a partner or a partnership; or
- between a look-through company and an owner of that company.

This new relief will be limited to situations where the transferor and the transferee are associated for 2 years before the transfer and you will only be able to claim rollover relief once in any 2-year period.



Residential Tenancies Amendment Bill 2024 passes first reading.

The Residential Tenancies Amendment Bill 2024 passed its first reading in Parliament on 21 May 2024. If enacted this will roll back many changes to the Residential Tenancies Act 1986 introduced by the previous New Zealand Government.

Introduction

The Residential Tenancies Amendment Bill 2024 (Bill) aims to remove barriers to rental supply and incentivise property owners to rent their properties via the private rental market.

If enacted, the Bill will reverse a few of the notable changes made to the Residential Tenancies Act 1986 (Act) by the prior Labour government, including re-introducing 90-day no-cause terminations and a landlord's right to terminate a fixed-term tenancy at the end of the term without a specific reason.

The Bill also introduces a number of new changes, including pet bonds to encourage landlords to rent to tenants who have pets, and new powers for the Tenancy Tribunal to decide disputes without requiring an oral hearing.

Overview of the Key Changes

The Bill, if passed will:

1. Reinstate a landlord's ability to unilaterally end a fixed-term tenancy at the end of the term without requiring a specific reason.

Under the Act, a landlord can only give notice to end the tenancy at the expiry of the fixed term if one of the specified grounds in the Act is made out, while the tenant can give 28 days' notice in any case of their intention to end the tenancy on the expiry of the fixed term. The Bill will reverse these changes so that either the landlord or tenant can give notice up to 90 days, but no less than 21 days, before the expiry of the fixed term to end the tenancy.
2. Reinstate 90-day 'no cause' terminations for periodic tenancies. This means a landlord can end a periodic tenancy without requiring a specific reason.
3. Reinstate a landlord's 42-day notice period to terminate a periodic tenancy where:
 - (a) they or a family member want to move into the property;
 - (b) the tenancy agreement states that the property is usually used to house employees, and they want to move an employee into the property; or
 - (c) where the property is subject to an unconditional agreement for sale requiring vacant possession.
4. Return tenants' notice period for ending a periodic tenancy to 21 days.

5. Clarify that clauses in a tenancy agreement which prohibit smoking inside a rental property are enforceable. A tenant will still be allowed to smoke outside (other than on balconies, porches, or similar) and in outbuildings that are used only for storage or parking.
6. Enable a tenant to utilise family violence withdrawal provisions where their child, or a person who is dependent on them for care, lives at the property and is a victim of family violence.
7. Enable some decisions in the Tenancy Tribunal to be made on the papers. This means the Tenancy Tribunal will be able to make decisions on certain tenancy disputes based on documents submitted to it by the landlord and/or tenant, rather than having to hold an oral hearing.
8. Permit tenants to keep pets.

The justification for the introduction of pet provisions into the Act is that landlords are often reluctant to lease to people with pets. Due to damage pets can cause to a property and the difficulty recovering costs from tenants where pet damage costs exceed the value of the bond, many landlords choose to have a strict prohibition on keeping pets in their properties. Accordingly, people with pets often struggle to find rental properties. There is also no mention of pets in the Act and this has given rise to a lack of clarity about the enforceability of clauses that prohibit pets.

Under the Bill a tenant may keep a pet if the tenancy agreement provides for it, or the landlord gives written consent. A tenancy agreement must not prohibit a tenant from keeping a pet without providing reasonable grounds and must not impose unreasonable conditions about keeping a pet

The Bill will also amend the Act to make tenants liable for the full cost of any damage caused by a pet kept at the property unless the damage is fair wear and tear.

Conclusion

Landlords and tenants need to be aware of the changes proposed in the Bill and how this could affect the landlord/tenant rights and obligations. Submissions on the proposed changes closed on 3 July with the report back to the Select Committee due later in the year.



Queenstown Trails Trust

The Queenstown Trails Trust (Trust) is a charitable trust that is responsible for the planning and development of more than 200 kilometres worth of trails within the Whakatipu Basin.

The role of the Trust is to plan, develop, maintain and improve the world-class trail network and Anderson Lloyd have been fortunate enough to work alongside the Trust in this process.

The Trust's major focus is on connecting the Whakatipu community via an integrated commuter trail network, whilst also growing recreational off-road trails in and around the Wakatipu Basin.



The Trails

Where the trails pass over private land, individual right of way easements have been granted by the landowners in favour of the Queenstown Lakes District Council for the benefit of the community. The various landowners have granted these easements for no monetary benefit and the formation of these trails would not exist without their generosity.

The Trust's most recent project is the formation of a new trail that runs from Arthur's Point through to Arrowtown. The Trust is currently in the final stage of registering the trail easements for this project.

Anderson Lloyd's Involvement

Anderson Lloyd's involvement in the process has included:

- working alongside the Trust to enter into individual easement agreements with the relevant landowners within the district;
- liaising with the landowners and their lawyers to ensure that each easement is on terms agreeable to the land owner, the Trust, the Queenstown Lakes District Council and the Whakatipu community; and
- registering the right of way easements to ensure unhindered access across the trail.

This is a lengthy process however Anderson Lloyd have been fortunate enough to work alongside the Trust's fantastic team and are proud of the work that they have achieved.

To learn more about the Trust or if you would like to donate, become an official partner or volunteer, then please visit <https://queenstowntrails.org.nz/>.

Re Fairview Estate Investment Limited

[2023] NZHC 2874

This case relates to an application made by a developer to extinguish a covenant registered over two of its lots which prevented subdivision of the burdened land.

Fairview Estate Investment Limited (Fairview) is a property developer that was undertaking a subdivision of a property in Auckland (Property). The subdivision would result in 18 lots, 16 of which would be residential and two would be vested in Auckland Council as local purpose reserves (Reserve Lots). Fairview's subdivision was rejected by LINZ as it did not obtain consent from the owners of land that benefitted from a covenant registered against the Property's title. The covenant was for the benefit of land that borders the Property (Neighbouring Land) and required the owners of the Property not to object to any subdivision or development of the Neighbouring Land. The issue was that the Neighbouring Land had since been subdivided multiple times meaning that 28 lots benefitted from this covenant.

Fairview applied to have the covenant removed from the titles for the two Reserve Lots under section 317 of the Property Law Act. Fairview first argued that the covenant should be extinguished as the nature of the use being made of the land had changed. This argument was made on the basis that the covenant's original purpose was to prevent objections being made relating to the subdivision of the Neighbouring Land. The Court was not prepared to extinguish the covenant on this basis as the terms of the covenant was quite broad and the no objection provisions also extended to development on the Neighbouring Land.

Fairview's second argument to have the covenant extinguished was made on the basis that the covenant no longer serves a useful purpose, and if it does, the benefit is retained by the fact that the 16 residential lots would remain bound. The Court extinguished the covenant over the Reserve Lots on this basis stating that the extinguishment of the covenant will not substantially injure any person that would have otherwise benefitted from the covenant remaining on the Reserve Lots. The Court pointed out that Council had no interest in the Reserve Lots or any future development of the benefitting land, other than in its capacity as a territorial authority. Therefore, any further development of the land would be approached by Council wearing its "local authority hat", exercising the controls and discretions it already has.



Key takeaway points:

- **A no objections covenant could be removed from a title that is vested in Council due to the fact that Council are unlikely to have interest in objecting to any developments in their capacity as a "landowner".**
- **While there have been many successful extinguishments of these types of covenants in recent years, not every application will succeed and much will depend on the particular circumstances of the claim.**



Re Feng

[2023] NZHC 2074

This case serves as a reminder of who is liable where a nominee is used to complete a purchase as well as the importance of a purchaser conducting due diligence.

The Mills Family Trust (Trust) agreed to sell their property at 22 Manapau Street, Auckland (Property) to Mr Feng.

Mr Feng then nominated Mr Wang as purchaser who subsequently failed to settle the purchase. After the purchase fell through, the Mills Trust proceeded to sell the property at a significantly lower value and issued proceedings against Mr Feng and Mr Wang to recover the shortfall on the re-sale of the property.

The Court granted summary judgment jointly and severally against Mr Feng and Mr Wang to the value of \$756,597.31. The Trust issued a bankruptcy notice on Mr Feng for payment of the judgement sum. Mr Feng applied to have this set aside.

The Court could only set aside the bankruptcy notice if it was satisfied that Mr Wang had a cross claim against the Trust. The Court struck out Mr Feng's claim against the Trust on the basis that:

1. Although the Trust may have been aware that Mr Wang was the actual purchaser and not Mr Feng, this does not alter Mr Feng's liability under the sale and purchase agreement as he had signed it as purchaser.
2. The Trust, as vendor, had no legal obligation to ensure any due diligence was conducted by Mr Feng and this was his sole responsibility.
3. The fact that Mr Feng did not consent to the Trust's re-sale of the property is not a ground for a claim against the Trust.
4. The Trust was not 'in trade' in respect of the sale of the property, therefore the Fair-Trading Act 1986 did not apply.
5. There was no duty of care owed by the Trust to ensure that any finance or overseas investment office consent conditions were included in the agreement.

Key takeaway points:

- Purchasers need to be careful when nominating other entities.
- It is a Purchaser's obligation to complete any due diligence.
- The Vendor does not have to ensure the correct conditions are included in any agreement.



Whakaruru v Bath

[2023] NZHC 2474

This case relates to property being re-sold at a loss after a previous purchaser was unable to settle.

The Whakaruru Family Trust (Trust) entered into an unconditional agreement with Mr Bath for the sale of the Trust's property on Pallant Street, Manurewa (Property) for the sum of \$1,160,000 including GST.

Mr Bath's solicitors advised that due to changes in lending criteria and a decrease in property valuations, his financial position had changed and requested an extension to the settlement date and a reduction in purchase price. This was rejected.

Mr Bath failed to settle and the Trust gave notice the agreement was cancelled. The Trust relisted the Property and sold the Property for \$781,500 including GST. The Trust claimed for the loss on re-sale.

Mr Bath did not contest liability but opposed the decision on the grounds that by reselling the Property for approximately 30 percent less than the original price, the Trust failed to act reasonably to mitigate its loss on resale.

The Court concluded that the Trust did not act unreasonably to mitigate its loss and noted the following key points:

1. Under the standard ADLS agreement, a vendor may claim the loss incurred on a resale within a year of the agreed settlement date.
2. The vendor is granted a fair amount of leeway in relation to its duty to mitigate loss.
3. The Trust had no obligation to accept any of Mr Bath's subsequent offers to complete the purchase at a reduced purchase price with a six-month extension.
4. Due to the Vendor's financial position, the requirement for a faster sale was reasonable in the circumstances.
5. It is unnecessary to prove that the resale price represents the market value at the appropriate date.

Key takeaway points:

- A Vendor will be granted a certain amount of leeway when re-selling a property for a loss.



AGD Trustee Limited v Millbrook Country Club Limited

[2023] NZHC 2141

This case relates to an application made by a developer to extinguish a covenant registered over two of its lots preventing subdivision of the burdened land.

AGD Trustee Limited (ADG) purchased a property at Mill Vista Lane (Property) in 2021. The Property is on the southern boundary of the Millbrook Resort development in Arrowtown (Development). The Property had a covenant registered against its title which, among other things, required ADG to obtain approval from the “Grantee” for any construction or landscaping that would occur on the Property. While Millbrook Country Club Limited (Millbrook) was the sole Grantee at the time the covenant was registered, subdivision and development meant that there were 40 titles and 91 owners considered to be Grantees.

ADG wanted to build on the Property that was not in keeping with the Millbrook design guidelines – as a result, they now needed to obtain approval from all of the Grantees.

ADG considered the requirement to obtain approval from all 91 owners to be unduly expensive and time consuming and therefore sought to modify the covenant so that ADG only required approval from Millbrook. This application was made pursuant to sections 316 and 317 of the Property Law Act 2007, which allows for modifications to restrictive covenants where:

- the modification would not substantially injure any party involved; and
- it is just and equitable to modify the covenant.

ADG’s main argument for the modification not substantially injuring any other party was that they would still require approval from Millbrook, who represented most owners’ interests and could be relied on by the owners to enforce compliance. Therefore, there was a close alignment of interest between Millbrook and the owners.

ADG’s application was further aided by the fact that no other owners, apart from a subset of three, opposed the application. The three owners that opposed the application as they wished to protect their views – they entered into a confidential settlement agreement with ADG.

The High Court ordered for the covenant to be modified so that the references to “Grantee” would be replaced with “Millbrook Country Club Limited.”

Key takeaway points:

- **The presence of a resident’s society or other body that aligns the interest of benefitting parties can simplify the process of modifying restrictive covenants.**

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

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.

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