Edition 3 | March 2022

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Property Case Law Developments 2021

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Inside:

Welcome to the Third (2022) Edition of REAL, Anderson Lloyd's annual property case law update.

Not surprisingly, our opening case summary deals with the topical issue of COVID-19 rent abatements under leases. Unfortunately cases on this issue have been few and far between, which we suspect is a result of most leases requiring that any disputes over these matters be determined by confidential arbitration.

As usual, we have otherwise sought to cover a broad spectrum of property related issues including nuisance claims relating to trees near power lines, warranty breaches in a sale and purchase agreement, modification of land covenants, upgrading of rights of way, Overseas Investment Act approvals and the replacement of tenant fixtures and fittings.

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 10).

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COVID-19 rent abatement

Mountfort v Cheam [2021] NZHC 1535

This case concerned a tenant's entitlement to a rent reduction due to the effects of government COVID-19 restrictions on her business.

When the government imposed a national lockdown in 2020, the owners of a commercial property agreed to reduce the rent while their tenant was unable to operate her bakery business.

When the tenant continued paying at a reduced rate after the lockdown ceased, the applicants applied for an order for possession and cancellation of the lease under the Property Law Act 2007.

The Court of Appeal disagreed with the tenant's claim that she was entitled to a rent abatement for the ongoing effects of the COVID-19 restrictions.

The tenant relied on the clause in her lease requiring rent abatement where the tenant is unable to gain access to the premises. The court held this provision could not apply at Alert Levels 1 and 2 because the tenant was not prevented from accessing the premises.

The clause was not intended to apply where there was merely a lack of customers.

Where the breach is a failure to pay rent alone, relief against cancellation is a presumptive right. The judge therefore granted the respondent relief against cancellation, conditional upon payment of the outstanding rent and costs.

Key takeaway point:

Under a 'no access' clause in a lease, abatement of rent is not available for loss of business resulting from COVID-19 restrictions.

Commercial forestry near power lines

Nottingham Forest Trustee Limited v Unison Networks Limited

Over a two year period, a number of trees in a commercial forest owned by Nottingham Forest Trustee Ltd (NFT) fell onto power lines owned by Unison Networks Limited (Unison), causing damage and power outages.

Unison brought proceedings against NFT in nuisance and Rylands v Fletcher, seeking damages for physical and economic harm.

In the High Court, NFT was found liable in both nuisance and Rylands v Fletcher. Both gave rise to strict liability.

NFT appealed the High Court ruling. It argued that growing trees is a natural use of land, therefore NFT cannot be liable in Rylands v Fletcher. They also argued against their liability in nuisance, as it is not unreasonable to grow trees in close proximity to a power line.

Lastly, they disputed the finding of strict liability.

The Court of Appeal agreed that planting trees is a natural use of the land, and trees cannot reasonably be described as dangerous. The trial judge was wrong to find NFT liable in Rylands v Fletcher.

The judge nevertheless considered it unreasonable for NFT to allow the trees to grow to a height where they would cause damage to the lines if they fell. NFT's liability in nuisance was upheld.

The strict liability finding was also upheld, consistent with the law of nuisance and Rylands v Fletcher. The appeal was dismissed

Key takeaway point:

Where trees fall onto neighbouring property over a sustained period it will likely give rise to a nuisance claim.

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Notice of warranty breach

Lendlease Capital Services Pty Limited v Arena Living Holdings Limited

This case considered whether the meaning of "likely other warranties" extended to include a maintenance warranty for the purposes of a notification of breach.

The appellant (Arena) issued the respondent (Lendlease) with a notice of claim upon discovering watertightness issues with their recently purchased retirement villages. The notice cited breach of the watertightness and "likely other warranties".

Arena argued "likely other warranties" referred to a breach of the maintenance warranty, as the watertightness issues were caused by maintenance failures. Lendlease appealed, claiming the wording of the notification excluded specific reference to the maintenance warranty.

The Court held that a reasonable recipient would not have thought the notification applied to the maintenance warranty. Rather, the wording was a prospective indication for a claim rather than a notification of breach.

The Court referenced the English case of Teoco UK Ltd v Aircom Jersey 4 Ltd, which determined explicit reference to the warranty is not required where relevant facts indicate a specific warranty.

There was insufficient indication of maintenance failings to support Arena's interpretation of the wording. Arena's failure to alert Lendlease of maintenance failings within the required timeframe meant the appeal was allowed.

Key takeaway point:

In making notice of a warranty breach, claimants must include enough detail so that a reasonable recipient, with knowledge of an agreement's terms, would understand the specific warranty(s) to which the claim relates.

Modification of a covenant

Chand v Auckland Council

Clarifies when a court may use its discretion to modify or extinguish a covenant under s 317(1)(d) of the Property Law Act 2007 (PLA).

The appellants (the Chands) purchased one lot of land within a subdivision. They sought to further subdivide their property into 5 lots. The land was subject to restrictive covenants, preventing further subdivision.

The Chands sought to extinguish the covenant under s 317(1)(d) of the PLA, claiming the proposed subdivision would not substantially injure any person entitled.

The neighbouring properties (the Respondents) wished to enforce the covenant.

It is well established that the onus is on the appellants to persuade the judge to extinguish or modify a covenant.

The Supreme Court decision in Synlait Milk v NZ Industrial Park Ltd confirmed that all relevant factors must be considered under the s 317(1)(d) analysis.

The Court of Appeal held that if the covenant was extinguished, the respondents would suffer enduring injuries of loss of view, privacy, value, and intrusion of traffic and noise. These factors were likely to substantially injure the respondents.

The appeal was dismissed, with the appellant's ignorance of the covenants having no bearing on the case.

Key takeaway point:

When determining whether to modify or extinguish a covenant, a court will consider all relevant factors and whether they constitute an overall "substantial injury". Courts may be more reluctant to exercise their discretion where more than one respondent may be injured.

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Right of Way Upgrade

Cornes v Village Residential Ltd

This case concerned whether upgrading a driveway beyond its original condition fell within a Council's consent to carry out a property redevelopment.

The appellants (Cornes and Jones) owned a property. Village Residential Limited (VRL) owned the property in front of the appellants and benefitted from a right of way easement over the appellants driveway.

The Council granted VRL resource consent to redevelop its property on the requirements that the driveway be upgraded and a new drainage sump be installed.

The appellants felt the full upgrade would affect their privacy.

The High Court held that under schedule 5, clause 2(a) of the Property Law Act (PLA), VRL had an implied right to carry out the Council approved work which included upgrading the driveway.

On appeal, the Court rejected the appellant's argument that the rights conferred did not permit development beyond the land's original condition at the time of the grant of the easement.

The Court adopted the position that the benefitted landowner could undertake improvements to meet the purposes for which the easement was granted.

The purpose of the easement was to provide access, including vehicle access, for any lawful purpose.

Key takeaway point:

The wording of schedule 5, 2(a) of the PLA may be broadly interpreted by Courts, giving the benefited land owner(s) the right to upgrade a driveway if such work falls within the purpose for which the easement has been granted.

Overseas Investment Office approval

NZ Democratic Party for Social Credit Inc (SCI) v Minister for Land

This case considered the legality of the Overseas Investment Office's (OIO) approval of the sale of dairy processing plants to an overseas buyer.

In 2019, Westland Diary Co Ltd's (Westland) sold two dairy plants to Hong Kong Jingang Trade Holding Co Ltd (Jingang).

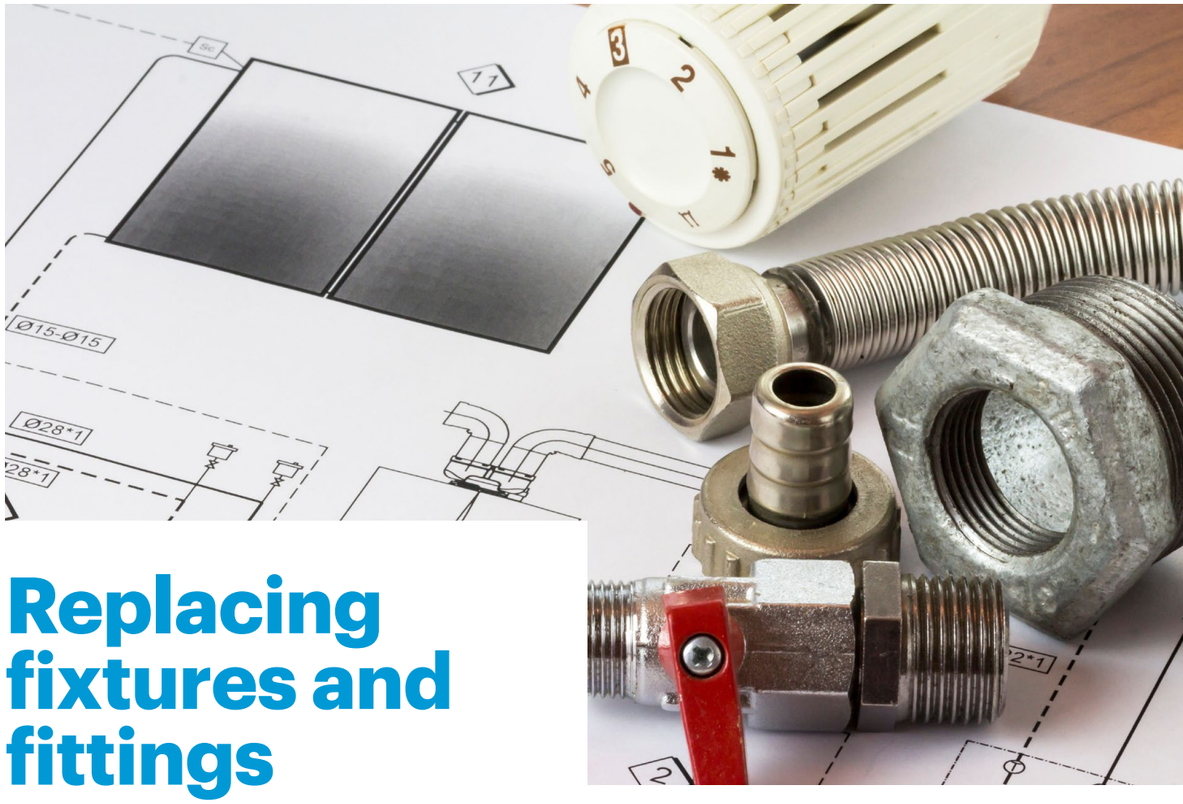
The New Zealand Democratic Party of Social Credit (Social Credit Party) appealed against the sale. The appeal centred around three contested issues under the Overseas Investment Act 2005 (the Act).

The first issue revolved around the classification of the land as "non sensitive", as per s 6(1) of the Act. In determining whether this was appropriate, the Court looked at the legislative context of the words "farm land" and "agriculture". It held that agriculture, when used in a farm land context, is reasonably understood to not apply to agricultural products after they have left the farm on which they were grown/produced. This meant the dairy plants were not farm land and therefore not sensitive land.

The second issue was whether the OIO had sufficient information to verify Jingang's application for the purpose of s 34 of the Act. The Court found the OIO's consent process was "carefully calibrated", satisfying s 34 requirements. In particular, the OIO conducted a five stage process prior to consenting. The OIO was right to be assured information provided by Jingang was correct because of the experience and credibility of Jingang's lawyer.

Key takeaway point:

Land on which the processing of agricultural products occurs will not usually be considered 'farm land' for the purposes of the Overseas Investment Act 2005 due to such processing occurring.



Replacing fixtures and fittings

Ventura Limited v Robinson

This case discusses which party under a lease is obliged to replace the fixtures and fittings.

Ventura Limited (Lessee) leased premises from the Robinsons (Lessor) for a 45 year term.

An arbitration found that neither party had an obligation to replace fixtures and fittings under the lease.

The Lessee sought leave to appeal. It submitted that while there was no express obligation on the Lessor to replace the fixtures and fittings, it was implied.

The High Court agreed with the arbitral tribunal and dismissed the Lessee's application. The lease contained no gaps and the absence of any express obligation on either party "was an entirely rational outcome".

The Court's decision was consistent with the Court of Appeal's ruling in Avondale Hotel No 1 Lt v Portage Licensing Trust. The Court in Avondale cited that while it is logical that the lessor bear the cost, it does not lead to the conclusion that the Lessor must carry out the replacement. This is emphasised when the parties commercial arrangements are considerably detailed.

In this situation, it was logical for the Lessee to determine how and when the fixtures and fittings should be replaced over the 45 year term.

The Lessee's fixtures and fittings would remain its property and the value of those fixtures and fittings would be excluded in calculating any rent review.

Given the length of this lease, it made commercial sense that the Lessee was responsible for replacing the fixtures and fittings, given they would be using them.

Key takeaway point:

The courts are reluctant to imply terms into leases where they have been considerably drafted and there is an apparent rationale for the absence of a term.

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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

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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

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If you have any questions about Property Law, please contact one of our specialist team above or check us out at **al.nz**