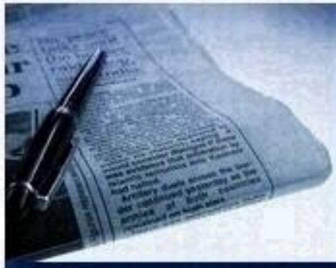

S J SCANNELL & CO

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If you have any questions about the newsletter items, please contact me, I am here to help.

Lease Agreement versus Tenancy Agreement – What is the difference?

We regularly see clients interpreting lease agreements and tenancy agreements as being the same document. However, while both agreements are similar, it is important to understand the differences.

Lease Agreements ("Lease")

A Lease is a contract between a landlord and a tenant for a commercial building. Leases are typically very detailed in regards to the conditions of the tenancy so that there are no discrepancies or issues during the term.

Leases cover the responsibilities ("warranties") of both the tenant and landlord in detail. Some warranties given by the landlord are in compliance with the Health and Safety at Work Act 2015 and to act reasonably when considering an assignment of the lease to a third party during the term.

Leases will typically include details such as the term of the Lease, its expiry date, the monthly rent payments, rent reviews and rights of renewal. There is an inherent benefit of including rent review dates and rights of renewal because this ensures that the landlord cannot arbitrarily raise the rent or cancel the Lease. However, it also ensures that the tenant cannot leave the property before the end of the term without repercussions.

If the existing lease reaches its expiry date, the lease is at an end. If the tenant does not leave the premise, under the Property Law Act 2007 they will be considered to be on a month to month tenancy. Therefore, if the tenant(s) wish to remain in the property, both parties must enter into a new Lease. The landlord has the option to renew the terms of the old lease or is free to change the terms and rental amounts as they see fit.

If you are in a commercial setting, in order to ensure the long-term letting of your premises, we recommend that you enter into a Deed of Lease.

Tenancy Agreements

A tenancy agreement is used for tenants of residential properties and is subject to the Residential Tenancies Act 1986 ("Act"). Where tenancy agreements include the obligations of either party, they are generally not as detailed or stringent as the warranties included in Leases. Some key responsibilities of landlords are maintaining the property in reasonable condition and allowing the tenant quiet enjoyment of the property.

There are two types of tenancy: periodic tenancy (lasting longer than 90 days) and fixed term tenancy. This article will focus on periodic tenancies.

Like a Lease, at the end of the periodic tenancy agreement term, the landlord can alter the terms of the tenancy agreement. However, if a tenant does not intend on renewing the tenancy agreement they have to give the landlord 21 days' notice prior to the expiration of the tenancy agreement in accordance with the Act.

We note that a periodic tenancy typically requires that the landlord give 90 days' notice for the tenant to vacate premises in accordance with the Act.

Tenancy agreements are suited to short term tenants such as people who are transitioning and are often used in residential rental properties.

Pros and Cons

Both lease and tenancy agreements have their advantages and disadvantages.

Rental agreements allow landlords to rent properties that might not be desirable to long-term renters. It is advantageous when rental amounts can rise quickly, allowing the landlord to renegotiate the terms of the agreement more regularly than a lease.

A Lease, on the other hand, is advantageous to a landlord by providing the stability of guaranteed, long-term income. It is advantageous to a tenant because it locks in the rental amount and length of lease and cannot be changed even if property or rent values rise.

When drafting a Lease or tenancy agreement, we recommend you seek the services of lawyer.

Cross-leases – What are they and what implications do they have?

Historically, cross-leases were a popular form of dividing land for land owners. This is because owners could avoid certain subdivision restrictions and would gain similar results to a formal subdivision under the existing Act, but at a fraction of the price.

However, when the Resource Management Act 1991 was introduced, it made significant changes to the existing subdivision laws and practices, which meant that cross-leased properties were deemed to be a subdivision and were no longer a way to avoid subdivision requirements and costs for landowners. As such, we are seeing the slow sifting out of cross-lease properties across New Zealand, as they are gradually being replaced with fee-simple titles where possible.

What is a Cross-Lease?

A cross-lease is where multiple individuals own an undivided share of land and a lease for part of the land/building. For example, if the property is divided into three separate segments, the owners will usually own an undivided 1/3 share in the land. Each owner of the land may then erect a building on their allocated segment of the land. This building will then be leased back to them (often for a term of 999 years) and recorded on the certificate of title ("title").

The leases that are created for the owners will record a "right of exclusive use and enjoyment" for each building and often the associated yard. This affords the owners of the relevant building under the lease the right of exclusive use of that segment of land and the building without interference from the other owners.

Along with these rights of exclusive use, the lease specifies rights and responsibilities in respect of 'common areas' (i.e. driveways, shared lawns or parking spaces) which apply to all owners, and often include the shared repair and maintenance obligations of these areas.

Unlike a fee-simple property, how you maintain and develop a cross-lease property is restricted and connected to the rights of the other owners, and vice-versa. The level of restrictions can vary depending on the lease and/or any variations made to this lease. Common examples of the restrictions other leasehold owners can impose are:

- limitations on alterations to the external dimensions of the dwellings or structures on the property;
- restrictions on household pets;
- a responsibility to maintain common areas; and
- limitations on the scope of the colours and materials you may apply to the external features of your house.

Therefore, if for example you would like to renovate and change the external dimensions of your house, you must seek out written agreement from all other leasehold owners. If you do not, the other owners may be able to seek remedies such as reversing the renovations.

Buying and selling a cross-lease

<u>Buying</u>

If you own a cross-lease property, it is beneficial to maintain a good relationship with the other cross-lease owners, as there is no guarantee their permission will be given freely to any proposed work.

When buying a cross-lease property, you need to weigh up the limitations of the lease against your intended use and/or development of the property and buildings to ensure you can fulfil these obligations.

With a cross-lease property, it is also important to clarify the boundaries for the exclusive use and common areas on the property. While most exclusive use and common areas are well marked on the flat plan and by fences or grass/concrete, some properties are not so clear or all grounds/yards are shared, which can cause disputes between owners.

<u>Selling</u>

If you are selling your cross-lease property, you should be aware that if the dimensions of the dwellings on the property do not accurately reflect the dimensions of the property recorded on the flat plan attached to the title, a purchaser can raise an objection; this is called "requisitioning the title". If you do not agree to amend the title (which can cost significant amounts of money), the purchaser has the right to cancel the sale and purchase agreement.

Conclusion

You should not be scared-off by cross-lease properties. However, understanding some of the finer points of cross-leases will be extremely beneficial for you whether you are buying, developing or selling. If you are buying, renovating, selling or converting (into a fee simple title) a cross-lease property, we recommend that you seek legal advice as to the requirements of the cross-lease.

Disputes Resolution Series: Negotiation – How can it help you?

Alternative Dispute Resolution ("ADR") methods are an alternative option to going directly to court. Using ADR methods instead of pursuing the matter in court is commonly more cost effective for the parties involved, ADR may also take less time to resolve the dispute. ADR relieves the court of cases which they believe can be resolved without court assistance. This article is the third and final article in our ADR article series and will focus on negotiation.

Negotiation is usually the first method of dispute resolution used when a dispute occurs. This is because negotiation has the ability to be quick, inexpensive and provide a binding resolution.

There are two types of negotiating methods commonly used, unassisted negotiation and formal negotiation. The difference between formal and unassisted negotiation is the involvement of lawyers. Unassisted negotiation is when the parties involved in the dispute negotiate directly with one another. In formal negotiations all correspondence will go through the parties' respective lawyers.

Unassisted Negotiation

Unassisted Negotiation is an inexpensive option in comparison to formal negotiation as all it costs the parties is their time. Occasionally, lawyers have the ability to polarise the matter and cause the other party to be defensive. Therefore, depending on the nature of the dispute, attempting unassisted negotiation has the potential to be more beneficial than immediately sending the correspondence through a lawyer. However, we do recommend seeking the advice of a lawyer to find out your entitlements in any dispute.

In most cases, we find that parties can resolve the issues themselves via unassisted negotiation. However, if the parties are entrenched in their views or have a sense of grievance, this type of dispute resolution can become ineffective. At this point, it becomes necessary to turn to other types of ADR options, one being formal negotiation.

Pros and Cons of Negotiation as a dispute resolution method

Pros

Negotiation in general gives the parties a higher degree of control to create their own process and craft their own agreement that is not required to be dependent on each parties' entitlement under the law. It can be more time effective than any of the other dispute resolution methods, is generally more informal, and typically less stressful.

A benefit of involving a lawyer and engaging in formal negotiation is the introduction of an objective third party which may improve communication between parties and preserve or enhance the relationship.

Cons

One issue is that negotiation, formal and unassisted, is far from guaranteed to succeed before it is necessary to resort to some other more formal and structured method of dispute resolution. This may take the form of mediation or arbitration which are discussed in our previous two articles.

Any type of negotiation regularly requires the parties to compromise. This can cause issues if both parties are uncompromising in their approach. If this is the case, usually another method of ADR is required.

Formal negotiation incurs legal costs. Furthermore, if the formal negotiation does not work, the parties may see it as a wasted cost and time.

Conclusion

We recommend that, if possible, the parties attempt unassisted negotiation first as this will save the parties legal costs. If unassisted negotiation does not resolve the issue(s), we recommend seeking legal advice as to which ADR method would be best suited to your dispute.

Subdividing Land – What to Expect

If you are considering purchasing land with the intention of subdividing or if you are simply looking to increase the value of your existing property by adding an additional house, there are a couple of things that you will need to understand before taking the leap, so to speak.

A subdivision involves the conversion of one large property, whether it be a parcel of land or a building, into two or more parts, to enable those parts to be sold or split into separate ownership.

To do this, a specific kind of resource consent, called a "subdivision consent", is required from the relevant local Council.

The statutory requirements governing subdivision are contained in the Resource Management Act 1991 (the Act). This Act enables the district and city councils to oversee and manage all subdivisions through district plans and resource consents, thereby controlling any adverse effects on the community and environment that the subdivision may have.

A range of different subdivisions are possible: fee simple, unit title or cross lease. A fee simple subdivision creates a new allotment from an existing allotment. A new certificate of title is created for this new parcel of land and this is independent of the original parent title. This is the most common form of subdivision and will be the focus of this article.

Anyone that is thinking about subdividing should be aware of the length of time involved in the subdivision process,

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whether it be in a rural or urban area. The length of time depends on the size and complexity of the subdivision project. The council, surveyors, Land Information New Zealand, and lawyers are each required to provide their input and sometimes this means that the length of time required is longer than anticipated.

Below is a summary of the stages involved in a subdivision process. The times indicated will vary depending on the complexity and size of the subdivision but as general rule of thumb, the process could involve around one month per party. In other words, a typical subdivision process can take some 5-6 months in total: sometimes, more. It is essential that whoever is undertaking a subdivision project plans well in advance for matters such as interest rate changes, holding costs, and the need for certificates of title to be issued before mortgages and sales of the new titles can be secured.

The subdivision process can be summarised into five stages.

1. Subdivision consent
2. Survey plan approval
3. Section 224c certification
4. Lodgement with Land Information New Zealand
5. Certificate of title

Stage 1: Obtain Council Approval

Almost always, anyone wishing to subdivide will need to obtain a resource consent. Even in situations where the proposed subdivision is a permitted activity, a certificate of compliance will be required.

Stage 2 - Approval of Survey Plan

The subdivision consent obtained under Stage 1 above must be 'given effect to' within five years of the grant of the consent. This is done by obtaining approval of a survey plan from the relevant city or district council.

The council will assess whether the survey plan conforms with the subdivision consent or certificate of compliance, including determining whether the conditions of consent have been or will be satisfied. If the survey plan is compliant, the council must approve the survey plan. If the survey plan is not compliant, the council must decline to approve the survey plan.

Stage 3 - Section 224(C) Certification

Before a survey plan can be deposited, a certificate must be lodged with the Registrar-General of Land confirming that the relevant council has approved the survey plan and that all of the conditions of the subdivision consent have been complied with to the satisfaction of the council.

Stage 4 - Land Information New Zealand

The penultimate stage of the subdivision process requires the lodgement of the legal title documents and the survey plan with Land Information New Zealand for approval.

Stage 5 - Certificate of Title

Once Land Information New Zealand's approval under Stage 4 above is received, the subdivision process concludes with the cancellation of the existing title and the issue of new certificates of title for each new parcel of land shown on the survey plan.

A Review of Labour's 100 Day Plan

Before the election, the Labour Party laid out a plan with 18 key goals to achieve within their first 100 days in office ("100-day Plan"). This 100-day Plan was adopted and implemented by the Labour-led coalition Government ("Labour"). This article aims to provide an analysis of the progress of some of the key goals as well as touching on some future policies that Labour intends to implement that may affect you.

Goal number three: Pass Healthy Homes Guarantee Bill ("HHGB")

The HHGB was passed in December 2017 and requires that any new tenancy from 1 July 2019 must be either properly insulated or contain a heating source able to make the home warm and dry. All tenancies must meet the new standards by 1 July 2024.

While the exact requirements are not in the HHGB, they will be set by Labour before the start of 2019. Grants of $2,000.00 will be available for eligible landlords to upgrade.

If you are a landlord who will be affected by this change, you will need to inquire as to whether you are eligible for a grant. If you are not, you will need to personally fund the upgrade.

We note that all foil insulation is now illegal and will need to be replaced.

Goal number four: Ban overseas speculators from buying existing houses

New Zealand's residential property will no longer be for sale to buyers who are considered an "overseas person".

Under the bill, an "overseas person" would be someone who is not a New Zealand citizen, or is not "ordinarily resident" in New Zealand. A person would be classified as "ordinarily resident" if they hold a permanent resident visa and have been in New Zealand for 183 days in the past year. The New Zealand Law Society have expressed concerns that people may innocently enter into sale and purchase contracts not realising that they are classified as an overseas person. Under the current Sale and Purchase template this would present contractual issues.

If you have any doubt as to whether you would be classified as an overseas person and you are planning to buy a residential property, please seek legal advice first.

Goal 17: Set the zero carbon emissions goal and begin setting up the independent Climate Commission

This goal has been partially executed. James Shaw, Minister for Climate Change, has announced a goal of net-zero emissions by 2050; however has not set up an independent Climate Commission. The Government has

already made progress on the 2050 goal as they have stopped issuing new permits for offshore drilling. Prime Minister Jacinda Ardern, has stated that "it is important to get ahead of a change that would inevitably happen as the world moves to combat climate change."

Labour has compromised by stating that the existing off-shore mining permits which cover an area the size of the North Island will continue to permit further exploration. Additionally, Labour has opened a new round of applications for onshore exploration.

Labour has reported that the industry is not at immediate risk but that New Zealand has signed up to international obligations under the National Government that it needs to meet.

Future policies that may affect you

Regional fuel tax: Aucklanders will pay a nine to twelve cent fuel tax. However, the fuel tax combined with Auckland Council's regional fuel tax could see Auckländer's paying upwards of 20 cents more per litre for fuel compared to the rest of New Zealand.

Secondary Tax: Although Labour does not plan to implement its tax plan until 2020, meaning that it will have to win a second term, as part of the tax plan they state that they will remove secondary tax which will mean significant savings for people who have two or more incomes.

Tourism and Infrastructure Fund: This won't affect citizens or New Zealand residents; however, it will affect foreigner visitors. The Labour government will charge a $25.00 levy on international visitors which is expected to equate to an extra $75 million each year. The Mayor of Rotorua, Steve Chadwick Faafoi, said there was no evidence that the levy would hurt tourism. However, National Campaign Manager had some reservations. We note that visitor taxes are a growing trend globally. Countries such as Australia, United States, Italy and Bhutan already impose such taxes to help grow the infrastructure that tourists use.

Conclusion

Economists have stated that because it is early in Labour's term, it is difficult to predict any kind of result. Therefore, it seems that New Zealanders are just going to have to wait to see how Labour performs in the coming months.

Snippets

Residential Land Withholding Tax – What is it and does it apply to you?

Residential Land Withholding Tax ("RLWT") is a tax deducted from residential property sales if the following applies:

1. The property being sold is residential land in NZ.
2. The sale amount is payable or paid after 1 July 2016.
3. The seller:
    a. Bought the property on or after 1 October 2015 through to 28 March 2018 inclusive and owned it for less than two years before selling; or
    b. Bought the property on or after 29 March 2018 inclusive and owned it for less than five years before selling; and
    c. Is an offshore RLWT person.

Any person or entity who falls within either 3(a) or (b) above will need to complete a RLWT declaration to identify whether 3(c) applies and RLWT needs to be deducted

RLWT does not apply to inherited properties, relationship property settlements or those who hold a certificate of exemption.

Proposed Bright-line Amendments

Historically, the "Bright-line Test" required gains on the sale of residential property (excluding main homes) within two years of purchase to be treated as income and accordingly created an income tax liability on the gain.

However, the Bright-line Test was amended under the Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Act 2018 ("Act") on 29 March 2018. The Act states that the Bright-line period is extended from two to five years and any profits will be taxed regardless of intention when the property was acquired. Residential properties acquired before 29 March 2018 will remain subject to the two-year Bright-line Test.

This amendment was expected given Labour's pre-election campaign on reducing property speculation. Revenue Minister, Stuart Nash, is of the view that this extension will make homes more affordable for owner-occupiers and deter property speculators and hopefully result in a fairer tax system.

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