LAWLINES

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The New Property Law Act

On 1 January 2008 the Property Law Act 2007 came into force, replacing the 1952 Property Law Act and several other related Acts, including a number of old English ones going back as far as 1257.

It has been described as the largest single change to property law in the past 55 years and is the culmination of a project that took over 16 years.

When the Act was passed last year, the Associate Justice Minister, Clayton Cosgrove, noted that the aim of the Act is to create modern, more user-friendly legislation for people buying or selling property, mortgaging their property to raise finance, or entering into commercial leases of land.

Not everything in the Act is new; some parts of it repeat or codify the existing law. The following highlights some of the changes that have been introduced.

Landlord's Consent
If a tenant asks a landlord for permission to transfer or sublease premises to a third party, or to change the permitted use of the premises, the landlord must not unreasonably withhold consent. The landlord must respond in writing within a reasonable time. If consent is given subject to conditions or is withheld, the landlord must give written reasons for their decision, if asked to do so by the tenant.

A range of parties affected by the decision may claim damages from a landlord if they suffer loss as a result of the landlord unreasonably delaying or withholding the landlord's consent.

Insurance Protection for Tenants
If the premises are damaged by an insured risk (e.g. fire, flood, explosion) the landlord and their insurers may not require the tenant to pay for the repairs. This is so even if the damage was caused by the tenant's negligence.

Distraint
The Distress and Replevin Act 1908 enabled a landlord to enter the premises and seize certain chattels of the tenant, if the rent was in arrears. This self-help remedy has been abolished.

Sale and Purchase – Return of Deposit
A purchaser of land now has a statutory right to apply to a court for the return of the purchaser's deposit. The surrounding circumstances must be such that a court would not order the purchaser to perform the contract and also that the purchaser has no right to cancel the contract.

An example could be where there is a defect in the property that the purchaser was not aware of until after signing the contract and paying the deposit.

The court is also given the power to cancel the contract and declare that the purchaser has a lien on the land to secure payment of the refund.

Conclusion
The new Act affects many facets of the law relating to property. It includes leases, sales and purchases, mortgages, access to land and special powers of the court.

Chances are, if you are dealing with land in any way, the new Act will affect what you are doing. With such a major law change, it is more important than ever to obtain proper advice at the outset of any transaction.

The Disputes Tribunal

Last year Edith, an elderly widow, paid a local painting contractor $7,000 to paint part of her house. After only 12 months the house looks terrible and needs to be painted again. The painting contractor has refused to fix the work and Edith has found another more reputable painter who will redo the work for a further $7,000.

Edith's lawyer has advised her that she can sue the first painter in the District Court but that the cost of doing so may make it uneconomical for her. Fortunately for Edith, she can bring a claim in the Disputes Tribunal.

What types of claims are covered?
The Tribunal is very versatile and can hear claims about almost anything, from car repairs to grazing stock, from a faulty new computer to hair dressing for a wedding gone terribly wrong.

There are some limitations. There must be a dispute - you can't file a claim if someone simply refuses to pay a bill, when there is no argument about whether they owe the money. The Tribunal is also limited in terms of disputes concerning employment, land sales, wills, rates, taxes, and other statutory amounts.

For most disputes the Tribunal is an informal, inexpensive, quick and private way to resolve the disagreement.

If the dispute relates to something worth up to $7,500, a claim can be filed as a matter of right. If the value is between $7,500 and $12,000, both sides must consent for the matter to be heard by the Tribunal. The Tribunal has no jurisdiction to hear a claim over $12,000.

Procedure
The Tribunal is much more flexible than a District Court. No one is allowed to be represented by a lawyer and the rules provide that the Tribunal shall determine disputes "according to the substantial merits and justice of the case". In doing so it is not bound to give effect to strict legal rights or obligations. This emphasis on what is fair and just, rather than the letter of the law, allows a referee to take matters into account that a judge in a District Court may be prevented from considering.

In Edith's case, she may have signed a contract with a clause prohibiting her from claiming compensation more than 6 months after the work was completed. The referee is not bound by that provision and may award her $7,000, if that seems to be fair and just. The referees are also not bound by the evidential rules of a court.

Preparation is the Key
Probably the single most important aspect of bringing (or defending) a claim in the Tribunal is preparation. Make sure that you have copies of any important documents, such as bills, receipts, photographs or reports. Ensure that any important witnesses can attend. If they cannot do so in person they may be able to attend by telephone and support a written summary of what they saw or know. Review each step of your claim (or defence) thoroughly before the hearing so that you can anticipate any challenge that the other party might make and anticipate any concerns that the referee may have.

Conclusion
Long memories of the problems associated with the Disputes Tribunal's predecessor, the Small Claims Tribunal, mean people sometimes assume the Tribunal is only suitable for the most basic disputes. In fact, if you prepare your claim carefully and thoroughly, it can be an excellent forum to resolve a dispute of up to $12,000.

We often prepare claims to be filed by our clients as well as prepare the full brief of documents for them to present at the Disputes Tribunal hearing. Please talk to us if you have a claim with which you need assistance.

Room with a View

Introduction
Imagine this, after considering the various housing options you decide you want an apartment in the heart of Auckland City. You want to be close to the action. It's central, a perfect base, a long term investment!

The city has many beautiful views so you want to be elevated to take advantage of the opportunity for that. You spy a brochure which covers the key aspects of your search. The apartments are not built yet but the glossy publication promises classy central city living, and that view. Once you have signed up and the building has been constructed, you walk in and discover that a roof is obstructing your priceless view!

A Misrepresentation
The key question for the court in the case that followed this disappointing discovery by the purchaser was whether the misrepresentation made in the brochure meant that the agreement to purchase could be cancelled. Alternatively, would the Court require the purchaser to pay over the purchase price and buy an asset that did not live up to the initial expectations? The Court in this case said settlement must proceed.

The Agreement and Plans/Specifications
After the "tease" in the original brochure, came the actual agreement for sale and purchase with detailed plans and specifications. These, when taken as a whole, showed the existence of the roof in front, and fully disclosed the exact situation. The agreement included the standard provision that once signed, the agreement was the binding and complete legal arrangement between the vendor and purchaser.

In other words, the brochure was not to be taken into account when finally deciding what the terms of the contract were. As the purchaser had the opportunity to take any legal or other advice available prior to signing, there was no reason, in the Court's view, why the contract should not stand. The Court ruled that the settlement must proceed.

Conclusion and Warning
In the excitement of the purchase, who would have given a thought to the roof next door, particularly as nothing was constructed at the date of signing. In hindsight, the warning is clear and the principle applies to every signed sale and purchase agreement. Before you sign, obtain all the advice you can, because prior representations will usually not be a relevant factor. In this instance, not only legal advice was required, but specific architectural advice regarding the plans and specifications was also needed.

New Zealand's Emissions Trading Scheme

Climate change is a hot topic as the mercury rises ever higher around the world. Legislatures are increasingly looking to new mechanisms to combat climate change and the New Zealand Government is now no exception.

In December 2007, the Government introduced the Climate Change (Emissions Trading and Renewal Preference) Bill which will give rise to New Zealand's first domestic emissions trading scheme.

Purpose
The Bill has two primary purposes. Firstly, to establish the New Zealand Emissions Trading Scheme (NZ ETS) and secondly, to create a preference for renewable electricity generation by implementing a 10 year moratorium on new fossil-fuelled thermal electricity generation.

Staged Entry
The government has provided for staged entry into the scheme as follows:

Stage 1 - Forestry sector, retrospectively from 1 January 2008. However, the obligation to comply

with the standards does not take effect until 31 December 2009;

Stage 2 - Liquid fossil fuel sectors, from 1 January 2009. As with forestry, the obligation to comply takes effect from 31 December 2009;

Stage 3 - Stationary energy sector and industrial process (non-energy) emissions, 1 January 2010;

Stage 4 - Agriculture, including farming and horticulture, and waste, 1 January 2013.

Participants
The NZ ETS affects three types of participants.

1. Businesses that are labelled as "points of obligation". These businesses (yet to be identified) will have specific obligations and must surrender New Zealand Units (NZUs) to cover direct emissions or emissions associated with their products. These businesses will generally be at the top end of the sector. For example, fuel companies, rather than motorists.

2. Businesses that receive freely allocated emission units for eligible afforestation.

3. Businesses that trade NZUs to take advantage of market opportunities that could arise.

Allocation of Units

The Government is yet to show exactly how it will allocate NZUs. It will do so depending on how different sectors and participants will be affected and whether they can pass costs on to consumers. Businesses such as fossil fuel providers and electricity generators, who can pass on cost increases to consumers, will need to purchase credits to meet their obligations. However, businesses, such as forest and farm owners, that cannot pass on costs will have units allocated to them.

Societal Impact
Expect an increase in transport and energy costs and the cost of products arising from various industrial processes. Essentially the cost of business will be directly related to the extent to which a business is able to reduce or offset omissions, thereby reducing the cost of NZUs. Consumers are inevitably going to resist these costs being passed on.

Eventually everyone will be affected in some way by climate change legislation. It is necessary for the business world to turn its mind to mitigating those cost consequences now. If you are an emitter, you can plan to reduce emissions, purchase NZUs, or reduce emissions below the sector level and sell spare units to another emitter.

Whichever way you look at it, humankind is going to inevitably pay for emitting carbon and, as some might say about politics: left or right is dead; it's all about the environment.

Snippets

Education Update – Violent Students

A school principal has successfully defended a judicial review of her decision to stand down a 7 year old student with ADHD for five days after a violent incident in the classroom.

The Education Act 1989 provides that a principal may stand down a student if there has been gross misconduct that is a harmful or dangerous example to others, or, the behaviour is likely to cause serious harm to the student or other students. Upon standing down a student, the principal must immediately notify the Ministry of Education and the parents, and give reasons for the decision.

The High Court reviewed the circumstances surrounding the decision and found that the principal acted within the law.

Consumer Guarantees Update

A recent High Court decision has finally answered a long-standing question arising from the Consumer Guarantees Act 1993: can a consumer take it upon themselves to arrange for the repair of a defective good and then claim the full cost back from the supplier; or, must the consumer first give the supplier the opportunity to provide a remedy?

The decision is unequivocally clear - the consumer must first afford the supplier the opportunity to remedy the defect. This is in line with the general policy of the Act that the suppliers of goods are liable to provide remedies as they, and not the consumers, should bear the risk of defective goods.

If you have any questions about our newsletter items, please contact us. We are here to help.