Property Speaking

Bethleham office:
243 State Highway 2, Bethlehem
Omokoroa office:
The Village, Hamurana Road, Omokoroa
PO Box 16010, Tauranga 3110
T 07 579 2350
admin@klb.co.nz
www.klb.co.nz

KaimaiLaw
BETHLEHEM & OMOKOROA

ISSUE **45** | Autumn **2024**

Welcome to the first issue of 2024 for *Property Speaking*.

We hope you enjoy reading this e-newsletter and that you find the articles to be both interesting and useful.

To talk further about any of these articles, or indeed any property law matter, please don't hesitate to contact us – our details are on the top right of this page.

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Commercial leasing and landlord consent

Tenants wanting to alter the premises or their use

If you are a landlord owning commercial property, you may want to know how your tenant can make changes to the premises, or its use of the premises, without speaking to you about it first. If you are a tenant, you may want to know what you can do without being in contact with your landlord.

Tenants under commercial leases generally have fairly broad rights for the use and enjoyment of the property. There are, however, some limitations on what can be done without your consent.

PAGE 2 ▶

Easements

Rights of way, draining sewage and water, and conveying utilities

An easement is an instrument registered on the title to your property that allows another party, usually your neighbour, to use the part of your property specified in the easement.

In this article we explain the types of easements, their maintenance and repair, and your obligations, and what can happen if there are issues around costs and who pays.

PAGE 3 ▶

Property briefs

The new government has brought in significant changes to the property sector.

Bright-line test changes

As of 1 July 2024, the bright-line period will be reduced from 10 years (or five years for new builds) to two years.

RMA legislation

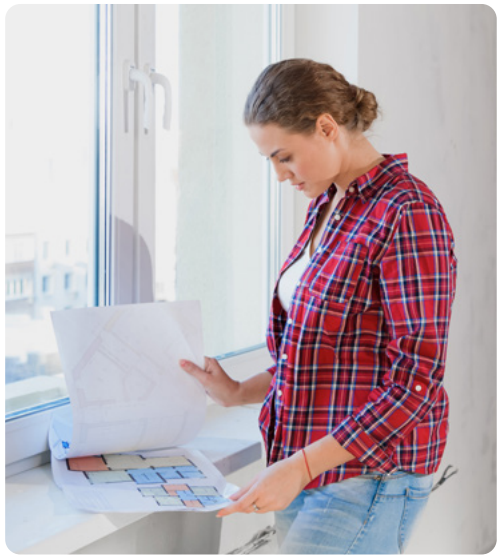
Two statutes that were intended to replace the Resource Management Act 1991 were repealed in December, although the government has retained some aspects of the Labour Government's legislation.

Rental and tenancy updates

There are changes to notice periods, mortgage interest deductibility, 90-day no cause evictions and the introduction of pet bonds.

PAGE 4 ▶

Commercial leasing and landlord consent



Tenants wanting to alter the premises or their use

If you are a landlord owning commercial property, you may want to know how your tenant can make changes to the premises, or its use of the premises, without speaking to you about it first. If you are a tenant, you may want to know what you can do without being in contact with your landlord.

Tenants under commercial leases generally have fairly broad rights for the use and enjoyment of the property under the lease, but there are some limitations to what tenants can do without your consent. These include changing the business use of the property, assigning the lease or altering the premises. When considering any tenant's request for consents under the lease, you must act reasonably.

Change of business use of the property

The deed of lease usually records the business use of your tenant in the first schedule. Your tenant cannot use the premises for anything other than the business use without your prior written consent. Provided the proposed use is not in substantial competition with the business of any other occupant of the property, reasonably suitable for the premises and compliant with any applicable statutory provision relating to resource management, you cannot unreasonably withhold consent to your tenant's request to change the business use of the premises.

Alterations or additions

Your tenant cannot make any alterations or additions to the premises, or alter the external appearance of the premises, including affixing signs or advertising on the exterior of the building, without your prior written consent. In the case of signs, you cannot unreasonably withhold consent if the sign is to describe your tenant's business.

If your tenant wants to make alterations or additions to the premises, or alter the premises' external appearance, they must provide you with plans and specifications for the proposed works. They will also need to comply with all statutory requirements when completing the works, including obtaining any necessary building consents and/or compliance certificates. You cannot unreasonably withhold or delay your consent to these additions or alterations.

If you require it, your tenant (at their own cost) must reinstate the premises and repair any damage caused by the alterations or signs by the end of the lease. If the additions or alterations are not removed by the end of the lease, you may elect to retain ownership of these without any compensation payable to your tenant.

Assignment of the lease

Your tenant cannot assign the lease or sublet any part of the premises or carparks without your prior written consent. Again, you cannot unreasonably withhold consent. There are certain conditions which your tenant must meet, otherwise it will be considered reasonable for you to withhold consent. These include:

- Your tenant can demonstrate to your satisfaction that the proposed assignee or subtenant is respectable, responsible and has the financial resources to meet their own commitments under the lease
- All rent has been paid by your tenant and they are not in breach of the lease
- Your tenant and assignee have (or will) signed and delivered to you a deed of assignment of lease
- If the assignee is a company, you are entitled to request a deed of guarantee to be executed by the principal shareholders of that company, or a bank guarantee from a registered bank to be delivered to you as a condition of your consent, and
- Your tenant agrees to pay your reasonable costs and disbursements in respect of the approval and the preparation of any documentation you require. These costs are generally payable whether or not the assignment or sublease ultimately proceeds.

Under the more recent versions of the ADLS standard lease, any change in the legal or beneficial ownership of a tenant company which results in the effective management or control of the company changing, such as the majority shareholder selling its shares, is treated as a deemed assignment and also requires landlord consent.

We can help

While landlords and tenants can generally work through issues of landlord consent at a commercial level by themselves, occasionally there can be problems, particularly if a landlord does not want to consent to the request or the request results in substantial changes to the lease.

It is a requirement of the lease that any landlord consent granted is recorded in writing, and we recommend for both landlords and tenants that you comply with this requirement. Any conditions to the consent, or changes to the lease which may result from the consent, should also be recorded in writing.

Whether you are a landlord or a tenant negotiating through a consent request, we recommend early contact with us. We can assist with advising what is and isn't reasonable from each party in the circumstances, and can help to ensure that what you have agreed is correctly recorded, to reduce the chances of disputes in the future. +

Easements

Rights of way, draining sewage and water, and conveying utilities

An easement is an instrument registered on the title to your property that allows another party, usually your neighbour, to use the part of your property specified in the easement. In this article we explain the types of easements, their maintenance and repair, and your obligations, and what can happen if there are issues around costs and who pays.

Types of easements

The most common form of easement is a right of way; these are often used where two neighbours share a common area such as a driveway. Other easements include rights to drain sewage and water, and to convey gas or electricity. These last two rights are common where different utilities need to cross through (under the ground) another person's property to get to yours.

These easements are registered on your record of title for the benefit of one or more other neighbouring landowners. Landowners who have the benefit of an easement will also have an interest registered on their title noting that their land has the benefit of an easement.

Some easements, called 'easements in gross,' are registered against a record of title for the benefit of a local or territorial authority such as your local council or for utility companies. Easements in gross are commonly used to facilitate local councils' installation of water and sewage, and connecting the drain and sewage systems from roads to each individual property. In respect of a utility provider, an easement in gross allows the provision of electricity to a number of properties from the main grid.

Who is responsible for maintenance and repairs?

Disputes most commonly arise when it comes time to repair a shared driveway, or when a pipe bursts and a water easement is disrupted and one or more properties find they are without water. Often the first question for parties involved in this situation is – who is responsible for the cost?

The Land Transfer Regulations 2018[1] set out the rights, powers and obligations of parties in respect of easements. Where more than one party has use of the easement, each party is responsible for an equal share of the costs of repair or maintenance of that easement. This applies across all types of easements except for easements in gross where the grantee (the council or other body getting the benefit of the easement) is responsible for the full cost of repairs and maintenance.

There are a couple of exceptions to the equal sharing of maintenance and repair costs that we have set out above. The first exception is where one user of the easement causes the damage to the easement area. This may occur where one party engages contractors who cart heavy machinery up and down a shared driveway over a period and damage the drive. In that instance, it would be for the owner using the easement who engaged the contractors to bear the cost.

The other exception is where the parties using the easement agree to different proportions of liability for an easement. An example is where a number of properties access a long shared driveway but one access is near the beginning, close to the road and the other is,

say, 800 metres further up. It is common for these parties to agree to share the costs equally to the shortest user's gate and then for the back property to be solely responsible for maintenance and repairs to their driveway past that point. The basis for departing from these rules is that one user of the easement is using much more of the total area than the others and so the parties can agree that they will contribute in unequal shares.

In some circumstances, disproportionate shares are recorded in the easement instrument registered on the title.

Paying or completing the repairs?

If repairs are required to enable the users of an easement to continue to benefit from it and the landowner whose land is subject to the easement won't cooperate, the Regulations provide a right of access for any person or their contractors in order to complete works for repairs. Before going onto the property, however, you must give the owner reasonable notice that you intend to access the property to complete the works and cause as little disturbance to the land or the owner as possible.

If the owner who caused the damage still won't pay for the easement area to be fixed, the Land Transfer Regulations set out the dispute resolution process to be followed in order to resolve an ongoing issue.[2] This involves engaging an arbitrator to determine the appropriate outcome; this should only be considered as a last resort.

Understand your obligations

It is important to understand your rights and obligations relating to easements whether you own the land 'burdened' by the easement or are simply a neighbour who takes benefit from it. The Regulations are a great starting point but, before you take any steps to enforce your rights or before you buy a property that grants or gains a benefit from an easement, you should talk with us to ensure you are acting within the law. +

1 Schedule 5.
2 R14 Schedule 5, Land Transfer Regulations 2018.

Property briefs

The new government has brought in significant changes to the property sector; we outline what these could mean for you.

Bright-line test changes

Under the current framework, the bright-line rules affect properties that were acquired on or after 27 March 2021 and sold within five years for qualifying new builds or within 10 years for all other properties. The bright-line period starts on the date that the transfer took place and ends on the date which you enter into a binding agreement for sale and purchase to sell your property (this is slightly different if you purchased your property off the plans).

There are exclusions where the bright-line rules do not apply such as:

- For the period which the property has been your main home
- If the sale of your property is subject to other tax rules, and
- Where your property is farmland or business premises.

As of 1 July 2024, the bright-line period will be reduced from 10 years (or five years for new builds) to two years. While the new rules have not yet come into effect, the government has announced that properties sold after 1 July 2024 will only be subject to the bright-line rules if they are sold within

two years from when your property was purchased.

There are still some details that have not yet been confirmed relating to the bright-line changes such as:

- Whether the bright-line rules are triggered by the transfer of property in and out of trust ownership
- What date the bright-line period is calculated on, and
- The 'main home' exemption.

The changes to the bright-line test regime will likely be very welcome to landlords who look to benefit greatly from this change.

RMA legislation

In December 2023, the government repealed the Natural and Built Environment Act 2023 and the Spatial Planning Act 2023, that came into force in August 2023, and were intended to replace the Resource Management Act 1991 (RMA). It has, however, retained:

- The fast-track consenting scheme which is similar to what was available during the Covid period, and
- The Spatial Planning Boards whose role is monitoring, evaluating and reporting on the effectiveness of the Act to relevant ministers.

The government has confirmed it will ensure Treaty of Waitangi settlements are upheld.

This is the first phase of a three-stage plan which intends to replace the RMA with new resource management laws.

The final goal is to repeal the RMA entirely and replace it with legislation that the government believes is more fit for purpose.

Rental and tenancy updates

Notice periods: Month-to-month/periodic tenancy rules apply where tenants must give 28 days' notice to leave the property and landlords must give their tenants 48 days' notice if they intend to sell, move into the property or carry out major renovations. The government's new proposed notice periods will change this to 21 days for tenants and 42 days for landlords.

Mortgage interest deductibility: This is the ability for landlords to deduct the interest they pay on their mortgage as a business expense thereby reducing their taxable income. The government announced on 10 March 2024 that as of 1 April 2024, landlords may claim back 80% of their interest for this purpose. The announcement also confirmed that from 1 April 2025 mortgage interest deductibility will increase to 100% of interest.

Ninety day no-cause evictions: The government's restoration of no-cause evictions is another major change on the horizon. Landlords will no longer have to provide tenants with an explanation as to why they have been evicted if they give tenants 90 days' notice to leave their property.

Pet bonds: The introduction of pet bonds will allow landlords to require tenants to pay a higher bond, rather than four-weeks' rent if they intend to have a pet on the property. Damage caused by pets would then be deducted from the bond for the repairs to the property.

These changes to the status quo for residential tenancies will have significant impacts for landlords and tenants alike. The government has not, however, indicated when legislation will be introduced on all the above issues.

If you would like any more information or advice on any of the above topics, please don't hesitate to contact us. +