WebbFarry Lawyers

Newsletter - Autumn 2020

AS Gallery

We are delighted to announce that the next exhibition on show in the AS Gallery is by Michael D Cooke. The exhibition will be on display until 29 April 2020. Please see the last page for further information.

How do you enforce land covenants when a neighbour is in breach

Land covenants place rights and obligations on the land/property you own. It is an instrument that is registered on a record of title for a property that runs with the land, which creates a legal obligation to do, or not to do, something in respect of the land/property. Such restrictions can relate to anything from the colour of your house or what you use the property for; to where you put your rubbish or park your vehicle. These restrictions are commonly found in new suburban subdivisions to maintain the quality of the neighbourhood.

If you, or your neighbour, breach one of the covenants, steps can be taken to enforce and rectify the breach.

In recent times it has become more common to put a time limit on covenants. For example, if you are required to only use certain materials for building your home, in 30 to 40 years those materials may be out of date and the covenant more burdensome than beneficial. In some cases, covenants are no longer enforceable as the current law no longer supports them.

Processes to enforce a breach will largely depend on what is written in each individual covenant instrument. Common practice is to give written notice to your neighbour specifying the breach, the work to be undertaken, whether you believe contractors or workmen need to enter the land to remedy the breach, and the consequences that will follow should the notice not be adhered to.

Under section 310 of the Property Law Act 2007, your neighbour will have 15 working days to respond to your notice. If they do not respond in this timeframe, then it can be treated as them agreeing with what was written. You can then take action to rectify the breach and pass all reasonable costs on to your neighbour. However, your neighbour is entitled to respond with a cross-notice if they believe there has been no breach or they are not liable.

You must not take action to remedy the breach before the 15 working day timeframe has expired, nor if a dispute arises between you. Should you choose to take action anyway, your neighbour will not be liable to contribute to the costs.

Should you be unable to resolve a dispute, an application can be made to the court for resolution. The court can make an order on:

- the existence/enforceability of the covenant;
- whether any work is required and if so, the nature and extent of any required work;
- the reasonable and proper cost of any required work;
- who shall pay the cost of any required work;
- the time any required work is to be undertaken;
- the entry onto any land for the purpose of doing any required work; and/or
- any other matters arising.

Any order a court makes is binding on all parties.

If you are purchasing a property with land covenants it is important you understand the implications of this before completing the purchase. If you own land subject to covenants it is important you know what these are and your avenues for enforcing any breach. In any event, you should consult your lawyer to review any land covenants registered against your property's record of title.

Statutory entitlement for sick leave

We all get sick from time to time, and New Zealand law in the form of the Holidays Act 2003 recognises that an employee will be paid for some of those times, and rightly so.

As a general rule, the minimum sick leave available is five days per year. Employees receive another five days sick leave for each twelve month period following on from that. This entitlement should be enshrined in an employee's agreement with their employer.

A prerequisite to using sick leave is that an employee must have been in the same job for a continuous period of six months. There are also a minimum number of hours each week that underpin the entitlement.

Sick leave is available if an employee is sick or injured or when a spouse or partner who depends on the employee is sick or injured.

The availability of ACC is relevant when injuries occur.

Longer sick leave periods can be negotiated with an employer. Any unclaimed leave can be carried over from year to year, but accumulation options are to be clarified on a case-by-case basis.

But who wants to be sick?

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Overview of the Residential Tenancies Amendment Act 2019

The Residential Tenancies Amendment Act 2019 ("RTAA") was passed on 30 July 2019 and came into effect on 27 August 2019. The RTAA addresses key issues that have implications for both landlord and tenant including: tenant liability for damage, insurance statements, contamination of premises and unlawful residential premises.

Tenant liability for damage

The RTAA provides that if tenants or their guests damage a rental property due to their careless behaviour, the tenant will have to pay for the cost of the damage up to (whichever is the lower) a maximum of four weeks' rent or the landlord's insurance excess.

This amendment aims to encourage tenants to look after the premises they are renting, while ensuring they are not responsible for unreasonable repair costs. On the other hand, it also ensures that landlords are not burdened with the entire repair cost as a result of their tenant's damage to the premises.

Notwithstanding the above, tenants are still fully responsible for the cost of intentional damage to the premises.

Insurance statements

Landlords must provide a copy of their insurance details to the tenant, including whether the property is insured, and if so, what the excess is. With an existing tenancy (pre 27 August 2019), the tenant can request this information from the landlord. If the landlord does not provide the information, or inform tenants of changes to insurance details, the landlord may be fined with up to $500.

Contamination of premises

Landlords can test for meth contamination, while the rented premises are occupied, by giving tenants at least 48 hours' notice. Landlords must notify their tenant that they are testing for meth and the tenant has the right to see the test results. Recently there have been discussions regarding meth testing and what the acceptable standard of contamination (if any) is. The RTAA allows for regulations (yet to be introduced) for determining the process for testing, the acceptable contamination level, and the decontamination process. Landlords will not be able to rent premises that they know are contaminated at an unacceptable level.

Unlawful residential premises

Under the RTAA, the definition of 'residential premises' is amended so that even if a premises cannot be legally lived in, such as a garage or industrial building, but is lived in or intended to be lived in, they will still fall within the definition of a residential premises and accordingly be captured under the RTAA and fall within the jurisdiction of the Tenancy Tribunal. The Tenancy Tribunal can enforce the RTAA against landlords who breach the RTAA regardless of whether the premises are suitable for living in or not.

This change ensures that landlords are providing premises that meet all requirements relating to buildings and health and safety.

If a landlord provides an unlawful residential premises to their tenant, the landlord may be liable to pay all or some of the rent back to the tenant, the tenancy may be terminated, the landlord may be liable to the tenant for damages, or any other order the Tenancy Tribunal may provide.

Whether you are planning to become a landlord or tenant, we suggest speaking to your lawyer to assist with preparing a tenancy agreement in accordance with the RTAA. If you are an existing landlord or tenant, we suggest you revise the rights and obligations under the RTAA with your lawyer to ensure your tenancy arrangement(s) are compliant under the RTAA.

What is a Calderbank offer, and when it should be used?

A Calderbank offer, otherwise known as a "Without Prejudice Save as to Costs" offer, is a tactic that can be used to settle a dispute for a lower amount and avoid going to a court trial.

This tactic is named after a case from 1975 in the English Court of Appeal, between Mr and Mrs Calderbank. A Calderbank offer is an offer made by one party to the other side of a dispute. It puts the other side on notice that if the dispute goes before a court, and the outcome is less favourable to the other side than the Calderbank offer being made to them, the party making the offer is entitled to more of their costs of the trial process being recovered, as the court may take into account the offer when they decide on the costs awarded.

It was decided in the 1975 Calderbank v Calderbank case that the offer, made by Mrs Calderbank before the dispute proceeded to the courts, showed she had a willingness to settle the dispute. If Mr Calderbank had accepted the offer that was made to him before trial, then he would have actually been in a better position as the judgment was less favourable to him than Mrs Calderbank's offer, and neither party would have had to go through the court process. It was also held by the court that Mrs Calderbank was entitled to her costs as from the date that she made her willingness to settle known.

Either side of a dispute can make a Calderbank offer. If the defender of a dispute offers to settle out of court but for a lower amount than is being pursued, and the plaintiff rejects the offer, this Calderbank offer may be taken into account by the Judge when costs are being awarded. The plaintiff may be successful in their claim against the defendant in court, but for a lower amount than what the defendant offered them to settle out of court in their Calderbank offer. In this situation, the Judge can reduce the costs that are payable by the defendant to the plaintiff, leaving the plaintiff with an even lower amount in the end than first sought.

In the same dispute, it may be the plaintiff that makes a Calderbank offer to the defendant to accept to settle out of court for a lesser amount than they were originally claiming. If the defendant thinks they may get a better outcome at trial and refuses this offer, and the plaintiff is awarded a greater amount at trial than their Calderbank offer, the plaintiff may be able to seek increased costs from the defendant.

It is important to weigh up carefully whether to make or to reject a Calderbank offer. It is important to work out if you would want to make such an offer, and when you would make it, as costs are awarded from the date a Calderbank offer is refused. It is equally important to work out the parameters, both at which you would want to refuse an offer, and similarly at what point you would be prepared to accept it, and settle the matter without proceeding to court.

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Points of interest on drug and alcohol testing in the workplace

Drugs and alcohol can make an employee less effective, struggle to concentrate, careless, unable to make rational decisions, amongst other behaviour changes, but most importantly of all a hazard to themselves and other employees. Employers have an obligation to take reasonable measures to provide a work environment for their employees and others, that minimizes the hazards at work.

What is a hazard and what is reasonable?

As defined at clause 16 of The Health and Safety at Work Act 2015 ("HSW") a "hazard includes a person's behaviour where that behaviour has the potential to cause death, injury, or illness to a person (whether or not that behaviour results from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition that affects a person's behaviour)".

In the case NZ Amalgamated Engineering Printing and Manufacturing Union Incorporated & Ors v Air New Zealand Limited & Ors (2004) provided some factors to take into consideration what reasonable is, such as:

- Random testing is considered reasonable if employees work in a role where there could be a risk of serious harm from being under the influence of drugs and/or alcohol.
- The test results need to be assessed to a scientific standard and preferably a medical trained individual interpret the results.
- The employee must give their consent to being tested, if the employee refuses to give consent this refusal will be taken into consideration during the investigation and trigger a disciplinary investigation.
- The company policy should handle employees' personal information with sensitivity.
- Education and avoidance of use or abuse of substances should be the main goal of the policy.
- Rehabilitation should be the first remedy for an employee when a test is positive.

The starting point for drug and alcohol testing in the workplace is for employers and employees to be on the same page. This is achieved by the employer having relevant documents (such as a specific policy relating to drug and alcohol testing) in place and every employee is aware of these documents; what is expected of them, how testing will be conducted, consequences of testing positive, etc.

Privacy Act 1993 and Drug and Alcohol Testing

Drug testing involves the collection, storage and use of personal information. The Privacy Act allows employers to collect personal information but only for a lawful purpose, which relates to their work, and the collection must be necessary for that purpose. As touched on earlier, this is why the information gathered (e.g. a sample) must be collected lawfully. The collection must be seen as reasonable and must not be intrusive or biased on the employee. With that said the employer's obligation to provide a safe and healthy work environment under the HSW will likely amount to a lawful purpose for information gathered.

Drug and alcohol testing in the workplace remains a contentious topic, nevertheless drug and alcohol testing will remain in the workplace for the foreseeable future. As drug and alcohol testing is looked at on a case-to-case bases, it is recommended that you (as the employee or as the employer) contact your lawyer to discuss your position.

Webb Farry's particular expertise in change and restructuring processes, includes negotiating employment agreements and employment-related litigation.

"In an ever challenging business environment – where restructurings and rising compliance costs are commonplace – our team is clear-headed, pragmatic and focused on your commercial objectives."

David Ehlers LL.B, B.Com (Acc)
Partner

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AS

ALTERNATIVE SPACE GALLERY

www.asgallery.wordpress.com

One Trick Pony Series (E) 2019 (Acrylic on canvas 800x800mm)
Michael D Cooke

MICHAEL D COOKE

One Trick Pony 14.02.20 - 29.04.20

Variations on a theme. A scene is set. We see horse and rider on a trip, wandering. They ride without rein, without aim. The scene is reset, another aimless wanderer. I am on a trip; a variation trip. A loop.

What if there was only this from now on? What if I only painted equestrian portraits? What a totally unnecessary thing for an artist to do; plateau. The field of art is one of the very few occupations in which adhering to a general mandate is unnecessary. Art should be unorthodox, provocative, art should break laws, and revolutionize the status quo (wait, aren't these mandates?). And tradition? Forget all tradition (except for the tradition of the avant-garde, the tradition of reacting against all tradition). Nevertheless, it is the plateau of routine and ritual where I find myself painting this series.

One of the core intrigues for me while working through this series of paintings is the mechanisms of the sequential series itself. The implications of a sequential mode of production within a temporal context, means that each iteration commences from a point where the subsequent work resolves itself. This is progress with covert development. This is like a system with a feed-back loop, one that inevitably develops each subsequent output internally, in response to each variation and difference in its own repeated results.

The mechanism of the painted series also serves as an attempt to self-define a certain hidden essence, by providing a context in which to remain, to linger outside the door of the unknowable, scrawling on the surface the imagined shape of that enigmatic something on the other side.

But that's all behind the scenes stuff. Back to the set scene: A rider lost in thought, a rider in an inconsequential moment, a rider in their own elsewhere, viewed by us from our own disparate here and now.

I graduated from the DSA with a BFA in 2004. Fifteen years later I am working through the MFA program at the same institution. These works will be part of my submission for this program.