ISSUE 64 | WINTER 2014

Fineprint

lamb bain laubscher
lawyers

In this issue:

ISSN: 1174-2658

Satisfying Conditions in Agreement for Sale and Purchase

Must use your best endeavours to satisfy

The Kiwi 'Yeah... nah... she'll be right' attitude might endear New Zealanders to the world, but the recent High Court case of *Kerr v Lee*[1] made it clear that such an approach is not enough to satisfy conditions under an Agreement for Sale and Purchase. This article outlines the impact on property owners of that decision and the importance of understanding the obligations to attempt to satisfy conditions. It also gives advice on how purchasers can avoid breaching those obligations.

The background

The Lees owned a property in Takapuna and were interested in buying the Kerrs' Massey property. After discussion with a real estate agent (Mr Chang) as to what the Lees might get for their own property, the Lees signed an agreement to buy the Kerrs' property for $1.8 million. The agreement was conditional on the Lees entering into an unconditional contract for the sale of their Takapuna property by 7 July 2007. The condition recorded that the Lees required a sale price of $950,000. Not long before settlement the Lees' lawyer told the Kerrs' lawyer that the prior sale condition wasn't satisfied, and the agreement was cancelled. The Kerrs' lawyer contended that the Lees were obliged to settle, as they hadn't listed their property and had taken no other steps to sell.

The Lees responded by saying it wasn't necessary to list their property for sale as they had obtained valuations and real estate agent appraisals which showed the value of the Takapuna property was substantially less than $950,000. The property appraisals indicated a value of between $700,000 and $800,000. The valuer suggested that renovations were required to achieve a sum of $950,000. This valuer's opinion was endorsed by Mr Chang. The Lees completed renovations (costing between $25,000–35,000) to increase the value of the house.

1 *Kerr v Lee* [2014] NZHC 340

Contemporaneously with the renovations, the Lees entered into a private agreement to sell the Takapuna property to a friend (Mr Jeong) for $910,000. This agreement was conditional on a satisfactory valuation. Because they had a signed offer for the Takapuna property the Lees elected not to list the property with a real estate agent. Mr Jeong obtained a valuation of the Takapuna property for $840,000. After a failed attempt to negotiate the price down, the agreement was cancelled by Mr Jeong.

The Lees then approached another agent (Mr Soek) with a view to listing the property. Mr Soek believed that a sale of price of $800,000 was realistic. The Lees asked Mr Soek to list the property for $950,000. Mr Soek told the Lees it was not worth his while, given that it would be virtually impossible to sell the Takapuna property for $950,000 within the short timeframe required.

...reiterate the importance for buyers and sellers to get legal advice before committing to an Agreement for Sale and Purchase.

It's not clear from the facts of the case why this matter ended up in court. There's no record of any negotiations between the parties in the intervening six years between these events and the hearing in 2013. It appears likely that the proceedings were issued in 2013 as the Limitation Act 1950 (which applies in respect of this case) prohibited claims being filed six years after a demand is made.

In court

The court held that the Lees had breached their obligations under the agreement. Although they took some steps towards selling the property, the agreement required them to take *all* steps that were reasonably necessary. Listing the property was considered by the court to be one of those reasonably necessary steps. While other necessary things were done, these were insufficient on their own.

The court agreed that it was not unreasonable for the Lees to defer listing and advertising while they undertook prompt renovations. However the Lees should have immediately put the property on the market once the renovations were complete. The decision is silent on the method of listing the property and it's not clear if listing the property on, say, Trade Me would have been sufficient.

The court wasn't satisfied that the Lees' decision to wait and see what happened with Mr Jeong's Agreement for Sale and Purchase before listing the property was prudent. In the court's view listing the house with a real estate agent would attract more interest and therefore more likelihood of a successful sale. After considering the parties' submissions the court ordered the Lees to pay the Kerrs $100,000 (the deposit under the agreement) plus costs and interest.

This case followed another case, *Mana v Fleming*[1] where the purchasers (the Flemings) were also found to have breached their obligations under a prior sale condition. The Flemings were worried about openly advertising their property because of the adverse effect it might have on their local lawn mowing business. They thought that their business would lose its value if local customers knew they were leaving the area. Again, the court considered that 'covert' marketing and advertising was sufficient initially. Once the purchasers received no interest, however, the court said they should have begun to openly market the property.

In each of these two cases the courts noted that the purchasers had not sought legal advice as to their obligations.

Implications for both buyers and sellers

These two cases reiterate the importance for buyers and sellers to get legal advice before committing to an Agreement for Sale and Purchase. While both cases related to prior sale conditions, the principles apply to any conditional agreement.

If an agreement is conditional on any conditions, reasonable steps need to be taken to satisfy those conditions. For example, if a contract is conditional on obtaining satisfactory finance then enquiries need to be made of lenders (or a broker) as to the availability of finance. If these steps aren't taken, the above two cases would suggest that a buyer may be obliged to buy the property or pay damages to the seller. If finance isn't available it would be wise to have the lender or broker confirm this in writing so there's evidence if the cancellation of the agreement is challenged. Likewise, if a contract is conditional on an expert's report, those reports should be provided in writing.

Be clear on your property's value

As an aside, *Kerr v Lee* also records the dangers of entering into an agreement to buy property without having full knowledge of the value of a property that needs to be sold to help fund the purchase price. In *Kerr v Lee*, the Lees over-estimated what they would get for their property (in part because they were advised by real estate agents that they could get a far higher price than the rating valuation). Property buyers need to be aware that if they sign an agreement subject to the prior sale of their own property, they must take steps towards selling, even if the likely sale price will be less than originally expected.

Real estate agents are obliged to recommend that vendors and purchasers get legal advice before signing an agreement. There are very good reasons for this. Once an agreement is signed the parties are strictly bound by the provisions in the agreement. A cavalier attitude to contractual obligations can be a recipe for disaster. Legal advice should always be taken before signing an Agreement for Sale and Purchase, whether you are a vendor or a purchaser. ■

1 *Mana v Fleming* [2007] NZCA 324

Criminal Sanctions for Those Involved in Cartels

Proposed changes beef up the Commerce Act 1986

The law relating to cartels is changing and the changes will impose criminal sanctions on people or corporates involved in cartels. This article explains the reasons for the new legislation and how those changes will affect commercial behaviour.

Currently cartels are prohibited by the Commerce Act 1986, which make agreements between competitors unlawful through the price fixing provisions. The Commerce (Cartels and Other Matters) Amendment Bill includes specific provisions which define and prohibit cartel provisions in contracts, arrangements or understandings between competitors. The proposed legislation imposes up to seven years' imprisonment on individuals intentionally participating in cartels. These criminal sanctions raise the cost of such collusion.

The Bill has had its first reading in Parliament and is expected to become law later this year.

Why prohibit cartels?

The purpose of the legislation is to promote competition in markets in New Zealand. The economic theory is that competition promotes the efficient allocation of resources and provides benefits to consumers through low prices, increased quality of goods and services, and innovation. If the competitive process is interfered with by cartel behaviour then it imposes a cost on consumers from increased prices, consumers having less choice, and quality or service levels deteriorating.

The Bill prohibits entering into contracts, making arrangements or understandings that contain cartel provisions or the giving effect to a cartel provision. A cartel provision is one which has the purpose or effect of price fixing, restricting output or allocating markets.

Busting a cartel

Cartels are difficult to catch without the help of insiders. To aid detection the Commerce Commission has a leniency programme that provides incentives to companies to confess and help it in the investigation and prosecution of other companies involved in the cartel. Under the programme, the Commission offers immunity from prosecution to individuals or companies involved in a cartel if they cooperate and provide information and assist in any court proceedings. It's a condition, however, that they are the first member of the cartel to apply.[3]

Penalties

The proposed reforms will bring New Zealand's cartel regime into greater alignment with our significant trading partners and will enhance our ability to take action against global cartels.

Individuals will face up to seven years' imprisonment if found criminally liable. Corporates will be subject to fines of the greater of $10 million or three times the value of any commercial gain or – if this can't be ascertained – 10% of the turnover. This criminalisation has at its genesis the view of 'hard core' cartel conduct as white collar crime.

Genuine collaborative activity

Only intentional cartel behaviour has criminal consequences. A person has a defence if they can show they honestly believed they were engaging in a collaborative activity. A collaborative activity is *'an enterprise, venture, or other activity, in trade, that is carried on in cooperation by two or more persons; and is not carried on for the dominant purpose of lessening competition'*. The exemption looks to the substance rather than form of an arrangement. It would cover arrangements such as joint ventures, strategic alliances, syndicated loans and consortium bidding provided the arrangement had a legitimate purpose and the cartel provision was reasonably necessary to achieve that purpose.

To be certain that an activity will fit within the collaborative activity exemption, the Bill also introduces a clearance regime similar to the Commerce Commission's business acquisition regime. Competitors can prospectively apply to the Commission for clearance. This may be granted if the Commission is satisfied that *'the cartel provision … is reasonably necessary for the purpose of the collaborative activity; and … will not have, or would not be likely to have, the effect of substantially lessening competition in the market.'* It's worth remembering, however, that a clearance can be revoked where there have been material changes.

The Bill doesn't change the Commission's wide powers to obtain information. The penalties for failing to comply in an investigation, however, have been increased to $100,000 for individuals and to $300,000 for companies. There is no right to silence in Commerce Act investigations.

Other changes

Other small, but significant, proposed changes to the Act include clarification that a company cannot indemnify directors or employees, the scope of the Commission's powers in other jurisdictions and that an employee or agents' behaviour can be attributed to a manager or employer. A court can also order an individual involved in a cartel to be excluded from managing a body corporate.

The proposed criminal sanctions significantly increase the costs for those involved in cartels. Be careful when communicating or otherwise dealing with firms competing against you or when proposing to enter into joint ventures or strategic alliances. If you have any concerns, you should always contact us first for advice. ■

3 Leniency Policy for Cartels, Commerce Commission Fact Sheet, September 2011

Farm Succession Planning

What's important: is it the family or the farm?

With the average age of New Zealand farmers rising, many farmers are facing the challenge of deciding what will happen to the farm after they have gone. What is needed is a formal farm succession plan.

An effective succession plan enables a smooth transition of farm ownership and control to the next generation with appropriate legal structures in place which serve the whole family.

Many people shy away from getting to grips with a plan and there are often significant roadblocks including:

- The parents being afraid or unsure of how to talk with their children about what they intend
- The increasing average size of the economic farming unit raises capital requirements and exposes the farm business to more debt
- The difficulty in keeping up the momentum in implementing the farm succession plan, and
- Acknowledging that every farm and family is unique and there's no one-size-fits-all solution.

Where to start?

A farm succession plan first requires you (the parents) to start a conversation with your family and professional advisors about the future.

The first thing you'll need to decide is whether the succession plan has the *farm* at the centre of the decision-making or the *family* who own it. This is crucial.

If the *farm* is the centre of the succession plan then your decisions will revolve around how to maintain and develop the existing farm so that it doesn't fall out of the family ownership.

If the *family* is at the centre of the succession plan then decisions regarding what to do with the farm will revolve around what is best for the family – both now and in the future.

Involve the right people

In a farm succession planning exercise a team approach will bring about the best results. This team should include you both, your lawyer, accountant and banker. It's critical that all these professional advisors are prepared to *work together* and listen to your *real* wishes.

Family expectations

It's important that the expectations of each child are managed well. Have each of your children expressed their expectations regarding the future farm ownership and what role they hope to play? A family meeting as part of your succession planning creates an opportunity for open discussion amongst all members of the family.

Regardless of who is actually working on the farm it's a good idea to listen to the whole family. You may be surprised who would like the farm retained and who is not concerned so much.

Is your plan viable?

If a particular member of the family is appointed as the successor in terms of farm ownership it's important for everybody to have confidence that the successor has the skills and aptitude to run the farm successfully.

The plan needs to realistically address the capital requirements of the family members who continue the farm and the level of debt that's sustainable. The goal is to ensure success for the next generation.

A good plan addresses these questions:

- Would it be equitable for non-farming members of the family to allow the farming member of the family to receive a greater amount of assets when you both die?
- Does the family believe treating everybody equally is more important than maintaining farm ownership in the family name?
- How do you balance the interests of your non-farming family members in the succession plan? Are there other resources for them?

You'll need to get professional advice on what farm ownership structures should be established and the obligations you will both have to non-farming family members compared with the farming family members. You'll also need advice about the Family Protection Act 1955 and the impact of the Property (Relationships) Act 1976 on those decisions.

You'll also need to make sure your Wills are up to date, regardless of whether or not trusts are in place. If you have a trust, or several trusts, you should also sign a Memorandum of Wishes setting out your intentions for those trust/s.

Making it happen

A major issue in farm succession planning is that the issues can become too hard and the roadblocks we talked about earlier start to appear. It's becoming increasing popular to appoint an independent person to be responsible to keep up the momentum so that the plan is put in place, it's implemented and then reviewed regularly to ensure it's actually working.

You are unique

Every family is unique; it has a different number of children, debt loading, skill base and farm characteristics as well as expectations from each child.

Don't delay in getting your farm succession plan up and running. In the long run, you'll be pleased you decided to tackle this now.

Careful Planning Needed for Blended Families

If you're a member of a blended family you may be thinking about how to provide financially for your new spouse or partner, and your adult children from a previous relationship. You may be quite happy to provide for your spouse or partner in the event of your death. You may not be so keen, however, for your assets to then pass to your partner's children on your partner's death.

With blended families becoming increasingly common, this issue frequently arises – not only when dealing with relationship property matters but also when drafting Wills, establishing trusts and buying a home or other property.

The bad news

It's no longer a case of 'what is yours is yours, and what is mine is mine'. There are a number of ways in which your property or your family trust's property can be lost.

The common strategy of maintaining separation of income and assets is far from a complete answer. In some circumstances, that arrangement will be disregarded when a triggering event occurs such as a separation, death, or one partner going into residential care.

Nor is your Will always going to allow you to choose how to provide for both your partner and your children. On your death, your surviving partner may choose to claim their entitlement under relationship property law regardless of the terms of your Will.

Increasingly often, family trusts are also being challenged. Property transferred to a family trust, even before the start of a relationship, can be left exposed to claims by a partner.

A significant but easily dealt with risk arises from the way couples own their property. If you own property jointly with your partner rather than in shares, on your death your interest passes directly to your partner. If you intended under your Will to give your interest in that particular property to your children from an earlier relationship, that option will not be available.

Entering into retirement village occupation right agreements can also create this trap as joint ownership of occupation right agreements is almost always required.

The positive side

The good news is that steps taken at the right time can achieve your asset planning objectives. Carefully considered and formally recorded relationship property agreements can provide predictable outcomes in the event of separation or when you die.

Life interest wills can protect a partner from being forced to leave the relationship home during their lifetime while, at the same time, can protect an interest in the property for your children.

Trusts can also be a very useful tool for preserving assets. Arrangements made a short period before a relationship or marriage begins are at risk, however, without a relationship property agreement.

Doing nothing is unwise. Whether through fear of rocking the boat or complacency, inaction can result in family disputes and disappointment. The cost and upset caused by a family dispute arising on separation or death can often be avoided or minimised by taking advice at the right time – sooner rather than later.

NZ LAW Limited is an association of independent legal practices with member firms located throughout New Zealand. There are 57 member firms practising in over 70 locations.

NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills, information and ideas whilst maintaining client confidentiality.

Fineprint is printed on Advance Laser Offset, a paper produced using farmed eucalyptus trees and pulp from Well Managed Forests – manufactured in an ISO14001 and ISO9001 accredited mill.

Postscript

Locate cables before you dig

Of particular concern to farmers is locating where exactly underground phone or broadband cables are located *before* accidentally digging them up. Ignorance of the whereabouts of these cables is no excuse, you are liable for damage to these cables if you dig up or cut through these cables on your land – even inadvertently.

But help is at hand. By registering for free on www.beforeudig.co.nz this service will help you find the location of cables. You can also call them on 0800 248 344.

The service is free if you call between 8am-5pm on weekdays. They also ask that you give them at least two working days' notice before starting up your digger. You can also ask for a free plan online. ■

Planning to go into business?

When you're starting a business, it's vital that you have a proper plan but often you don't know how to start or what it needs to include. Help is at hand with the government's business website (www.business.govt.nz) which has excellent resources for Kiwi business.

The business plan template has sections on:

- Developing a business strategy
- Marketing
- Team and management structure
- SWOT (strengths and weaknesses, opportunities and threats) and success factors
- Market research and analysis, and
- Financial budgets and forecasts.

For first-time business owners who may need extra help, there's a Quick Start Business Plan Tool on the site, as well as a great deal of other useful material. ■

Get yourself a head start on health and safety

Company directors and managers will be pleased to read that new guide on health and safety in the workplace that just been published by the Ministry of Business, Innovation and Employment (MBIE).

The Health and Safety Leadership Guide is aimed at small to medium-sized businesses and is designed to give business owners and directors an overview of their health and safety responsibilities. Managing health and safety is about identifying the risks and hazards in your business and minimising those risks by having a plan that everyone follows, says MBIE.

It's up to you to show good leadership and ensure your business has good health and safety practices.

The *Guide* brings everything together that you need to know to get started with a health and safety plan. There's a low-down on the legal issues you need to be aware of, case studies and steps to help you develop a plan.

To download the free *Guide*, go to http://www.business.govt.nz/laws-and-regulations/health-safety/health-and-safety-leadership-guide ■

lbl
lamb
bain
laubscher
lawyers

PRINCIPAL
Sam Laubscher

CONSULTANT
Max Lamb

LAWYERS
Melissa Smardon
Sharon Schou

AREAS OF OFFICE PRACTICE

Asset Protection

Commercial Law — including Sale & Acquisition of Businesses

Commercial Leases

Company Law

Conveyancing — Rural, Residential & Subdivisions

Employment Law

Estate Planning

Pharmacy Law

Relationship Property Law

Rural Law

Trust Law

Wills & Estate Administration

Wind Farming

OFFICES AT:
Te Kuiti
127 Rora Sreet
PO Box 412
Te Kuiti 3941

Phone: 07 878 1011
Fax: 07 878 6693
Email: sam@lbllaw.co.nz
Web: www.lbllaw.co.nz

Hamilton: By appointment only