Property Speaking

DG LAW LIMITED
54 Lunn Avenue, Mt Wellington
PO Box 14 081, Panmure, Auckland 1741
DX EP 80503
T 0800 4 DG LAW or 09 574 5316 | **F** 09 570 9529
A/hours 021 527 311, 021 737 220 or 021 544 390
mail@dglaw.co.nz | www.dglaw.co.nz

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Welcome to the Winter edition of our property focused e-newsletter.

We hope you enjoy reading *Property Speaking*, and that you find the articles to be both interesting and useful.

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

NZ LAW
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Structuring your development and considerations for buyers in new subdivisions

The relationships between neighbours in a subdivision and the rules, regulations and the way these are enforced have evolved significantly from handshakes and agreements over the fence.

In the last few decades, in order to protect the value of each property, developers have become increasingly concerned with not only managing the look and feel of their subdivision, but also prescribing the rights and obligations of property owners within those developments.

PAGE 2 ▶

Revised Law Association Agreement for Sale and Purchase of Real Estate

Become familiar with changes

The majority of property sale and purchase agreements are recorded on The Law Association of New Zealand's Agreement for Sale and Purchase of Real Estate. The fourth revision of the Eleventh Edition of the Agreement for Sale and Purchase was recently released; most conveyancing transactions are now being completed using this revision.

It is important that anyone signing the Agreement is familiar with these changes and the implications of signing this document. We discuss some of the changes.

PAGE 3 ▶

Property briefs

There are a plethora of court cases involving property disputes. We highlight two cases that may resonate with property owners.

Right of way easement

The *Wimax* case involved a dispute arising between neighbours over a right of way (driveway) easement.

Cross lease dispute

A long-running dispute involving a party wanting to withhold consent for their neighbour to replace an existing house under a cross-lease.

PAGE 4 ▶

RETURN TO FRONT PAGE

Structuring your development and considerations for buyers in new subdivisions

The relationships between neighbours in a subdivision and the rules, regulations and the way these are enforced have evolved significantly from handshakes and agreements over the fence.

In the last few decades, in order to protect the value of each property, developers have become increasingly concerned with not only managing the look and feel of their subdivision, but also prescribing the rights and obligations of property owners within those developments.

There are a number of ways that developers can do this; the arrangements vary depending on a number of factors - each coming with its own pros and cons for prospective owners.

Residents' societies

These are becoming increasingly popular in larger scale developments. Residents' societies are usually incorporated societies; their structure and requirements are governed by the Incorporated Societies Act 2022. Membership to these societies is often mandatory by virtue of a land covenant registered on the record of title to each property in the development. The society's rules can be found on the Incorporated Societies Register.

Residents' societies are usually responsible for the maintenance of any shared property within the development such as communal greenspaces or perhaps a tennis court. Each property owner is required to pay an annual levy for the maintenance of these areas.

A benefit of a residents' society is that generally it will enforce the rules that individual property owners within that development must adhere to. In that way, as an individual property owner you won't have to seek your own legal advice and incur cost if, say, your neighbour refuses to trim their hedge. However, a dispute with the residents' society itself would require you to seek your own legal advice.

Due to residents' societies falling within a statutory framework not designed specifically for them, there are a number of inflexibilities that means they may not always be the most desirable option when setting up a governance structure in a development.

One problem is that the minimum membership for an incorporated society is 10 members. Therefore a development comprising fewer than 10 properties/members cannot be an incorporated society. There are some exceptions to that membership requirement whereby a body corporate comprises three ordinary members.[1] In that instance a residents' society may work for smaller developments.

1 Section 14 of the Incorporated Societies Act 2022.

Failing that exception, however, the developer will most often need to choose between a unit title or another mechanism to provide for governance between the property owners.

Further, when the residents' society is wound up, any surplus assets held cannot be distributed to members of the residents' society, instead they must be advanced to a nominated not-for-profit entity. This is very problematic as those assets will be critical to the development.

Unit title developments

Unit title developments exist within their own statutory framework - the Unit Titles Act 2010. They are usually administered by a body corporate which is responsible for collecting levies from the property owners, maintaining common buildings and assets, and administering the body corporate rules.

The body corporate manages the maintenance of the shared facilities – and in some instances the units themselves – in a similar way to a residents' society. The body corporate will have an ability to issue levies to contribute to a maintenance fund.

The benefit of buying a unit title property is that the legislation prescribes minimum disclosure requirements *before* you enter into a contract for sale of a unit title property and *before* settlement.

This transparency can appeal to a buyer who would otherwise need to rely on their own due diligence in reviewing a residents' society rules to ascertain any additional financial contributions they may have to make.

Land covenants

Property developers may use land covenants where there is little desire for a formal separate governance or management entity to administer the rules. The developer can simply prescribe requirements and obligations on the property owners through a land covenant

CONTINUE TO PAGE 5

RETURN TO FRONT PAGE

Revised Law Association Agreement for Sale and Purchase of Real Estate

Signatories should become familiar with changes

The majority of property sale and purchase agreements are recorded on The Law Association of New Zealand's (TLANZ) Agreement for Sale and Purchase of Real Estate. TLANZ recently released the fourth revision of the Eleventh Edition of the Agreement for Sale and Purchase (ASP); most conveyancing transactions are now being completed using this revision.

There are a number of changes in the new revision of the ASP, so it is important that anyone signing the ASP is familiar with these changes and the implications of signing this document. We discuss some of the changes below, although this is not a full list of the amendments.

New warranties

Both buyers and sellers must now provide a warranty that they (or their real estate agent) have not altered, removed or added any wording to the standard ASP, unless any alterations are easily identifiable (for example, a clause has been crossed out using a strikethrough, or an addition is easily identifiable). The use of PDF editing software has meant that it is possible to change the wording in the ASP without making it clear that these changes have been made.

The new warranty provides both parties with reassurance that they can safely assume that all of the standard terms apply, unless it is abundantly clear that they have been modified. If you are the seller, it is important that your real estate agent also understands this warranty. If the agent has made any alterations to the agreement without these changes being easily identifiable, you have breached this warranty; this could have financial consequences for you.

Another additional warranty that the seller now provides is the situation where they have completed any 'restricted building work' (as defined in the Building Act 2004, and typically involving work that is required to be carried out by particular qualified professionals such as a licensed building practitioner, chartered professional engineer or registered plumber/gasfitter or electrician) on the property on or after 13 March 2012, that this work was carried out or supervised by a suitably qualified person.

The effect of this new warranty is that the seller is warranting that they have actually complied with the exemption requirements, and may be liable for any loss the buyer suffers if it turns out that they did not.

Examples of restricted building work that may be exempt from building consent requirements include a carport between 20 and 40m^2 in floor area, which needs to be carried out or supervised by a licensed building practitioner or a chartered professional engineer, or replacing sanitary plumbing fixtures (such as a toilet), which must be carried out by a registered plumber. This warranty will also apply to any building work completed using the new granny flat exemption.

Changes to conditions

The requirements regarding cancelling due to non-fulfilment of the finance condition have changed. Now, instead of having to provide a 'satisfactory explanation of the grounds relied upon by the Purchaser,' the buyer must provide a 'reasonable explanation of the steps taken by the Purchaser to arrange finance.' This change means that, while the buyer still has an obligation to take reasonable steps to obtain finance, the buyer does not end up in a dispute with a seller over whether the grounds relied upon by them are 'satisfactory.'

If a buyer needs Overseas Investment Office (OIO) consent, the seller must now take reasonable steps to enable this condition to be fulfilled by the buyer. Previously, the seller was not required to do anything to enable the condition to be fulfilled. While OIO consent is primarily the buyer's responsibility, this new clause acknowledges that the seller may need to take steps as well to enable the buyer to satisfy the condition.

Claims for compensation

The claims for the compensation process have changed slightly. Now, the claimant (typically the buyer, but not always) must raise a claim for compensation as early as reasonably practicable, but no later than the working day prior to settlement, and they now may raise multiple claims for compensation.

The previous revisions only required a claimant to raise a claim no later than the working day prior to settlement, and limited a claimant to raising only one claim for compensation. Removing the number of claims the claimant may make is necessary

CONTINUE TO PAGE 5

Property briefs

There are a plethora of court cases involving property disputes. We highlight two cases – an easement issue and a cross-lease dispute that may resonate with property owners.

Right of way easement

The *Wimax*[2] case involved a dispute arising between neighbours over a right of way (driveway) easement.

Wimax and Fuge were neighbours along a right of way. Wimax owned the land on which there was the driveway; Fuge benefitted from the free and unimpeded right to use it to access their property.

Wimax had built structures on its property encroaching on the right of way area, including retaining walls and concrete parking walls. The structures replaced earlier structures, improved the driveway's appearance and did not encroach further than previous structures. They were, however, larger and more permanent than before.

Fuge discovered the structures encroached on the driveway and demanded their removal. Wimax refused, arguing that the structures did not impede Fuge's access and would be an unnecessary cost to remove.

Fuge initiated arbitration seeking an order[3] to enable the court to enforce the terms of the easement. The arbitrator found that the structures did not substantially interfere with the right of way.

Fuge appealed this decision to the High Court; this overturned the arbitrator's decision finding that the structures amounted to a wrongful interference.

Wimax then appealed to the Court of Appeal.

The Court of Appeal held that Fuge needed to show that there was a 'substantial' interference with their 'reasonable' use of the right of way. Fuge could not.

Despite the structures, Fuge could still use the driveway to access the property, just as the previous owners had done for over 60 years. Further, Fuge had no plans to develop their property on which the structures would impact. On balance, Fuge had rights over an adequate and effective driveway which did not need to be widened and was still useable despite the structures.

The Court of Appeal overturned the High Court's decision and Wimax was entitled to retain the structures.

Fuge, dissatisfied with this decision, appealed to the Supreme Court. The appeal was heard on 17 February 2026, although the judgment has not yet been delivered. It will be interesting to read it once it is released.

If you are a party to a right of way and have any questions regarding your rights and obligations under the terms of the easement, please contact us for advice.

Cross lease dispute

This involved a long-running dispute[4] involving the Goldsburys who withheld consent to their neighbours, the Turners, replacing an existing dwelling on their property which was subject to the terms of a cross-lease.

Most cross-leases provide that alterations cannot be made (or new structures erected) without the prior consent of the other parties. This consent cannot be unreasonably withheld.

The Turners owned the property at the front of a four-way cross-lease. The Goldsburys owned two properties to the rear. The Turner's property was derelict, and they sought the Goldsburys' consent to demolish and erect a modern building in its place. There were also issues with recurring flooding and so they wanted to 'lift' the property.

The Goldsburys refused to consent to the works, arguing (amongst other things) that their sea views would be impacted. The Goldsburys were only agreeable to a rebuild within the same footprint as long as there was no greater intrusion into the commonly owned airspace.

The Turners referred the dispute to arbitration, where the arbitrator ruled that the Goldsburys' withholding of consent was not unreasonable, and that it was not unreasonable to withhold consent for demolition where the dwelling was not uninhabitable and the proposal was to extend the existing footprint.

The Turners responded by applying to the High Court for a partition order,[5] separating the Turners' property from those of the Goldsburys under the cross-lease. Section 339 requires consideration of factors in section 342, including any hardship that would be caused by not making an order in comparison with the hardship that would be caused to any other person if an order was made. The High Court declined to make an order; the Turners then appealed to the Court of Appeal.

In a somewhat surprising move, the Court of Appeal placed greater emphasis on the relationship breakdown between the parties, the previous 'intransigence' and stubbornness of the Goldsburys about the development plans and the overall hardship to the Turners. Due to these facts and that the parties had reached an impasse, the court found it was necessary to grant a partition order subject to conditions to be determined by the High Court.

The Court of Appeal usefully confirmed that the test as to whether consent was unreasonably withheld under a cross-lease was to consider whether a reasonable lessor would withhold consent in the particular circumstances, and whether the lessor reasonably believed the proposed use would injure its interests.

If you are a party to a cross-lease and find yourself in a situation where you want to redevelop or are at odds with your neighbour, please be in touch and we can advise you on your options. +

2 *Wimax New Zealand Ltd v Fuge* [2025] NZCA 31.
3 Section 313 of the Property Law Act 2007.
4 *Turner v Goldsbury* [2024] NZCA 292.
5 Section 339 of the Property Law Act 2007.

RETURN TO FRONT PAGE

CONTINUED FROM PAGE 2

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registered on each record of title. These are enforceable by the owners of benefitted land, and often the developer.

A land covenant can be a cost-effective way to impose some obligations on the property owners, but without requiring annual levies or fees to be paid.

This can, however, become complicated when adjoining properties need joint insurance policies to be held by the property owners over their adjoining properties. Having to explain to a prospective purchaser that they must work out insurance arrangements between themselves and the other owners can be off-putting for a buyer.

As a consequence of this, a unit title structure, particularly where homes are adjoining, is probably a better structure for a developer to use.

Get advice early on

If you are considering doing any development work you should talk with us about the best structure for your purposes and whether any covenants should be registered on the titles.

If you are buying a property within a development bound by one or a combination of these structures, we can advise about what rules and obligations you may be bound by before signing on the dotted line. +

CONTINUED FROM PAGE 3

Revised Law Association Agreement for Sale and Purchase of Real Estate

to enable them to make a claim as soon as reasonably practicable.

Chattels

The chattels list has been altered slightly. Previously, the agreement listed blinds, curtains and drapes separately as chattels. Now, there is just a catch-all 'window coverings.' 'Automatic garage door facility' has also been added as a chattel; this clarifies that a garage remote is a separate chattel to the actual door, and further clarifies that the door itself (if there is a garage door) should also be in reasonable working order on settlement.

What does this mean for me?

Any time you sign a legally binding document, you should ensure that you fully understand your rights and obligations under that agreement. We strongly recommend that you talk with us before signing an ASP, whether you are signing as a buyer or as a seller. +

The next edition of *Property Speaking* will be published **early Summer.**