

Key changes to lease law as a result of The Property Law Act 2007.

BY JOHN CARTER



In this issue, senior partner John Carter covers two legal issues which are more than likely to affect our clients.

The Property Law Act came into effect January 2008. It makes many changes to property law. This article identifies some of the more important changes to lease law.

An oral agreement to lease for less than a year is now legal.

A covenant to keep premises in a good condition does not require the tenant to put those premises into that condition if the premises were not in a good condition when the lease began.

Where the lease contains any provision requiring the landlord's

consent it is now implied that such consent cannot be unreasonably withheld or delayed.

A landlord cannot require a tenant to remedy damage caused by an event the landlord is insured for or has covenanted to insure for, criminal acts excepted.

Subleases for longer than the term of the original lease are no longer treated as an assignment and the term of the sublease is reduced to the same period as the original lease.

Prohibition of assignment

A landlord may still completely prohibit assignment. If a tenant may assign with the landlord's consent, the landlord cannot now unreasonably withhold consent and must give consent or notify the tenant in writing that the consent is withheld within a reasonable time. Consent is deemed to be unreasonably withheld if as a condition of giving consent the landlord requires the payment of money in any shape or form (other than legal costs) or imposes on the tenant any unreasonable conditions. A tenant may recover damages for any loss suffered because the landlord unreasonably withholds consent or fails to notify the tenant that consent is withheld.

Change of business use

In respect of changes of business use, if consent is required, the withholding of consent will be unreasonable or arbitrary if the proposed new use is not in substantial competition with the business of any occupant of the property, is reasonably suitable for the premises and complies with the requirements of the RMA.

Absolute covenants against change of use are still legal.

Re-entry

A landlord must now, before it can exercise its right of re-entry for non payment of rent, give written notice and the rent must be in arrears for ten working days before the right of re-entry and termination arises. This applies in all cases. If the tenant has already given up possession of the premises no notice is required to the tenant but notice must be served on any mortgagee or receiver and on any sub-lessee and their mortgagees or receivers. In respect of other breaches by the tenant (other than payment of rent) a notice still has to be served giving reasonable notice to remedy the breach.

If a landlord accepts rent after giving notice of its intention to cancel the lease this will no longer operate as a waiver of the landlord's right to re-enter and forfeit.

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>> Renewals

Similar provisions have been retained giving the tenant the right to apply to the High Court for relief for a refusal by the landlord to renew. In addition, the landlord must now give notice of its intention not to renew the lease specifying the refusal, advising the tenant of its right to apply for relief and the three month time limit on such an application and advise the tenant to obtain legal advice.

A landlord's right to execute distress against the tenant's goods on the premises to enforce payment of outstanding monies is now abolished.

The above are general summaries only. You should seek our specific advice on one-off situations.



This year marks the tenth Carter & Partners annual golf day.

Coming up on September 8 at Titirangi Golf Course invitations will go out shortly. We are looking for interesting auction and raffle items. If you have anything you are willing to offer please make contact with Sarah Robson on 377 5384.

MATES, the Mentoring and Tutoring Education Scheme, run by Lesley Max's Great Potentials is the charity that benefits. We probably all benefit actually because the MATES programme identifies young people who have the talent to go to university or further learning but for whom it is an unreal hope.

The results are dramatic with 99 out of 121 going on to tertiary study last year. Principals say it is the best educational programme and is one of the best ways to improve the quality of our work force. Without an educated work force we don't have a strong economy.

If you wish to play, feel free to register now by calling Carter & Partners on Tel 09 366 1366.

Relationship, Property & Trust Busting

In a recent speech, Justice Priestley said "The 2002 amendments have opened up, and legitimately in my view, various veins which can be quarried in a Property Relationship Act context.

But the legislation is both limited and conservative (rightly so in my judgment). I do not consider the PRA is an effective vehicle for spectacular 'trust busting'."

However, the Judge went on say that trusts which were sloppily run and were in all but name "an individually controlled slush fund for a partner" must be vulnerable.

The courts have also clarified the extent to which section 182 of the Family Proceedings Act 1980 which gives wide powers to the courts to modify trusts following the dissolution of a marriage or a civil union, can be used for trust busting. The section enables the court "to make such orders with reference to the ... whole or any part of any property settled on any ante-nuptial or post-nuptial settlement as it thinks appropriate".

The courts have now held that the section is limited to property within a trust which was settled on the trust at the time it was established. The establishment of a trust and the contemporaneous transfer of a home to the trust by the husband and wife with an arrangement to forgive the trust the debt which it owes them can amount to a settlement which the courts can adjust under section 182.

However, the effect of recent court decisions is that assets which are acquired by trusts sometime after the trust has been created are not vulnerable to attack under section 182.

If you wish to settle property on a trust, without the property being liable to be redistributed under section 182, the property should be settled on the trust at a suitably distant date after the trust is created.

Properties which are purchased from third parties by a trust should normally not be subject to section 182.

Sham Trusts

The Court of Appeal has also recently dealt with the question of "sham" trusts. The Court held that any finding of sham where a trust is involved should not be lightly made as a sham finding would deprive beneficiaries of their rights under the trust.

The Court also held that for a trust to be a sham it was necessary to show a 'subjective' common intention between the settler and the trustees at the time the trust was set up, that the trust was not intended to be a trust. Subsequent sloppy administration (including intermingling of monies and confusion between the affairs of the trust and the person behind it) is not sufficient in itself to make a trust a sham.

We recommend you get advice on specific transactions.