

Property Speaking

ISSUE 38 | Summer 2021

Welcome to the Summer 2021 edition of *Property Speaking*, and the last issue for the year.

With Covid's Delta strain visiting New Zealand over the past months and the resultant lockdowns we have all endured, in this edition we have some material on various issues around Covid and property. We hope you find these articles both useful and interesting.

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



Disputes in contracts

Help is at hand if things go wrong with your build

Building your own home or doing renovations can be a way to get exactly what you want in your residential property.

Even with the best preparation and planning, however, there are things that can go wrong in a build: deadlines, poor quality or surprise costs.

One current common issue is unexpected delays or costs due to Covid-related supply disruptions.

We look at some possible remedies, or protections, that may help if something goes wrong with your build.

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Caveats

Protecting your interest in land

The Latin word 'caveat' literally translates to 'let him beware'.

In a legal sense, caveats are generally used to protect the proprietary rights of the person registering the caveat by stopping the registered owner of the property from transferring, mortgaging or otherwise dealing with the property.

We look at why a caveat can be used, when it can be registered and how to remove it.

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Impacts on property dealings during Covid

With Auckland and parts of the Waikato in Level 3 and the rest of the country sitting at Level 2, Covid has impacted the property sector. Some guidance is below.

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Thinking of letting your holiday home? You will need to think about the difference between an Airbnb arrangement and a residential tenancy.

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Disputes in contracts

Help is at hand if things go wrong with your build

Building your own home or doing renovations can be a way to get exactly what you want in your residential property. Even with the best preparation and planning, however, there are things that can go wrong in a build: the work may not be completed in the agreed timeframe, the quality may be poor or there may be surprise costs. One current common issue is unexpected delays or costs due to Covid-related supply disruptions.

If you find yourself in one of these situations, there are a few things to keep in mind.

Your contract may have the answer

The first step in any build dispute is to look at your contract with the builder. Often your contract will provide an answer about who is responsible for things like unexpected costs.

By law, for any residential building work over \$30,000 (including GST) in value, your builder must provide you with a written contract setting out things such as the scope of the work, expected start and end dates, how changes are negotiated and how problems with the work will be fixed.¹

Your contract also may set out timeframes for raising issues with your builder and how you need to do this. This is why it is particularly important to talk with us about your contract before signing and as soon as any issue arises.

Other laws may protect you

If things go wrong, you also might find help in the other legal obligations your builder has under the Building Act 2004, Fair Trading Act 1986 and Consumer Guarantees Act 1993 even if you do not have a contract.

For example, regardless of what your contract says, section 362I of the Building Act 2004 requires your builder to carry out the work in a competent manner, follow all laws around the work including the Building Code and complete the work within a reasonable time. If your builder fails to do any of these, you can require your builder to repair the work or replace materials or, in some situations, pay you compensation instead.

In addition, your builder has obligations under laws, such as the Fair Trading Act 1986, to not mislead you about the quality of the work, the qualifications of the people completing the work or the price involved. If these obligations are not met, your builder could face criminal prosecution.

Don't withhold payment without following the correct process

When something goes wrong, it can be tempting to refuse to pay any invoices until the problem is fixed, but this can cause more headaches for you. Under the Construction Contracts Act 2002, after your builder has issued an invoice, you must pay within the time required by your contract (or otherwise 20 working days) or your builder can take legal action to recover this debt. Some build contracts also will include the


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ability for your builder to mortgage your home if invoices are unpaid.

If you dispute the amount owing – for example, you disagree that your builder has completed all of the relevant work – then you must issue what is known as a ‘payment schedule’. This sets out the amount you will pay on the due date and the reasons you dispute the remaining amount. You then must pay the agreed amount and try to resolve the dispute about the remaining portion of the invoice.

If negotiation doesn't work, there are other options

If you have tried unsuccessfully to resolve a dispute directly with your builder, there are other options open to you. For example:

- + For claims of a value up to \$30,000, you can apply to the **Disputes Tribunal**. Lawyers cannot attend this Tribunal and the process is less formal and costly than court.

- + For higher value claims, you can apply to the **District Court** for a judge to make a decision about your dispute.
- + For claims relating to weathertightness issues, you can apply to the **Weathertight Homes Tribunal**.
- + You could ask a private dispute resolution service to help with mediation or adjudication, such as the **Building Disputes Tribunal**.
- + If your builder has failed to provide you with a written contract and other documents where required by law, you can complain to the **Ministry of Business, Innovation & Employment**.
- + If your builder has been negligent or incompetent, you can complain to the **Building Practitioners Board**. This board does not deal with payment disputes.

If you have a building dispute, do contact us early on so we can help you assess your options and the next steps. +

¹ Section 362F Building Act 2004; Building (Residential Consumer Rights and Remedies) Regulations 2014.

Caveats

Protecting your interest in land

The Latin word 'caveat' literally translates to 'let him beware'. In a legal sense, caveats are generally used to protect the proprietary rights of the person registering the caveat by stopping the registered owner of the property from transferring, mortgaging or otherwise dealing with the property.

Why use a caveat?

There are a number of scenarios in which you may want to register a caveat. Some examples are:

- + When there's a significant time lag between a purchaser signing an agreement and settlement, or where (after the agreement is signed) the vendor may try to cancel the agreement. A caveat should prevent the vendor from dealing with the property in any way that will interfere with your interest.
- + A beneficiary of a trust may need to register a caveat to prevent the land to which their beneficial interest relates being transferred. Again, a caveat registered in this instance will protect the beneficial interest being claimed on the land.
- + There is also a provision under section 42 of the Property (Relationships) Act 1976 available if you wish to prevent land that is the subject of a relationship property claim being dealt with by your ex-partner in a way that defeats your interest or estate in the land. Registering a caveat in this instance is a good way to protect your interest until any relationship property dispute involving the land has been resolved.

As you are likely to already be dealing with us (or another lawyer) in any of the above-type matters, we will work with you on the registration of a caveat.

When to register a caveat?

The Land Transfer Act 2017 sets the framework for the registration of caveats. One of the most important things to consider before deciding to register a caveat is whether the interest that you want to protect meets the criteria in section 138(1). A 'caveatable interest' should only be registered where it meets the relevant criteria.

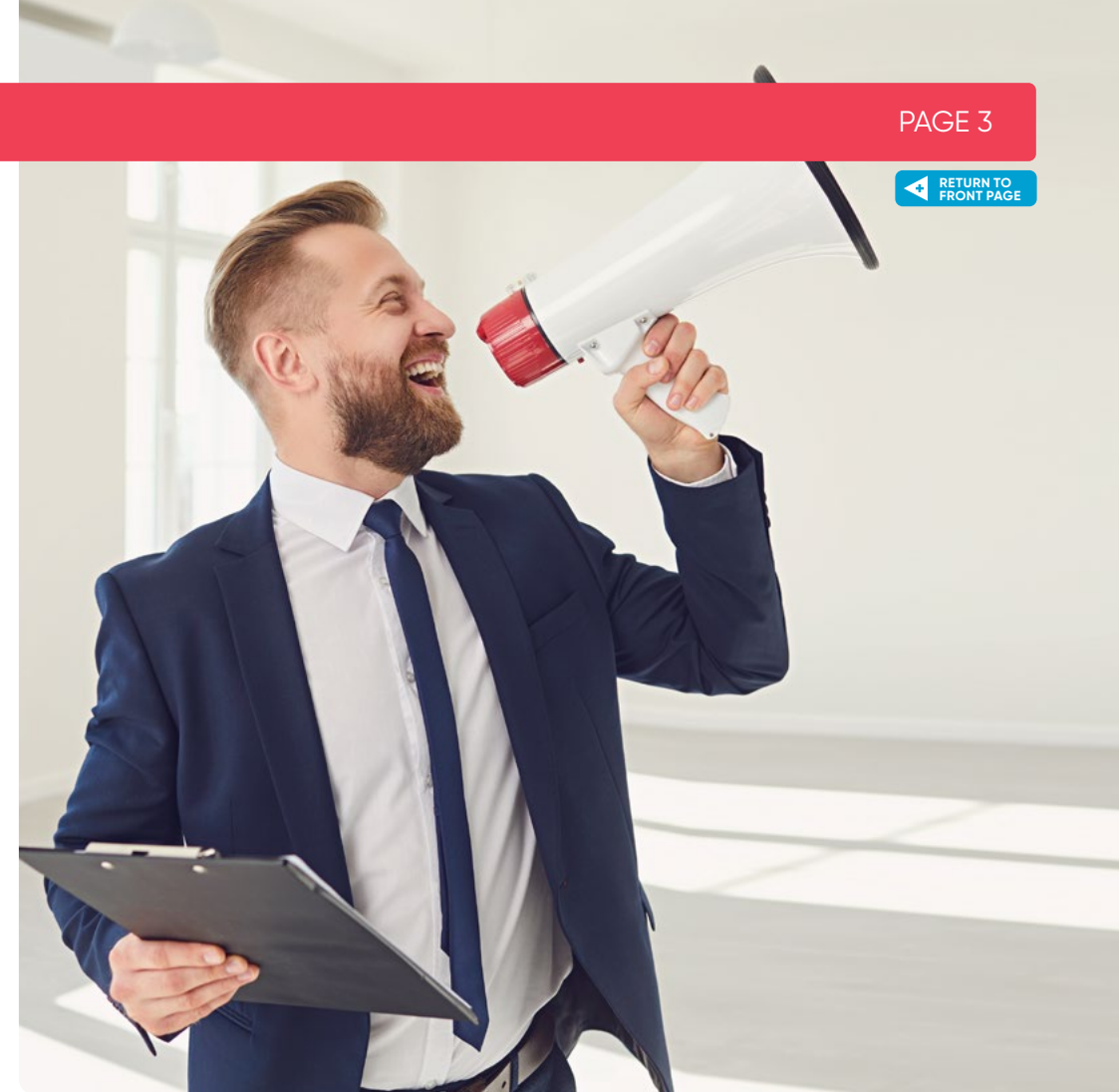
If you register a caveat against the land without a caveatable interest, you are liable for any loss or damage suffered by the registered owner of the land as a result of the caveat. Therefore, it is important to get clear legal advice regarding the interest you want to protect, because a mistake as to whether your interest is sufficient to support a caveat could result in a costly damages claim.

Registering a caveat

Having determined that your interest or estate is a caveatable interest, we will help you ensure that the formative requirements of the caveat are met, and will prepare an authority and instruction form to register the caveat.

How do I remove a caveat from my land?

A caveat is generally removed in one of three ways. It is withdrawn by the person



registering it, it lapses or it is removed by an order from the court.

Often a caveat is withdrawn – usually at the registered owner's request – on the basis that they have or will fulfil any outstanding obligation to the person who has registered the caveat.

A caveat may lapse if it is not followed by the requisite order being made by the Registrar-General of Land pursuant to section 143 of the Act. The timeframes prescribed are either 10 or 20 working days

unless the court makes an order that the caveat has lapsed at an earlier date.

Finally, the person whose estate or interest in the land is affected by a caveat may apply to the court for an order that the caveat is removed.

Caveats are very useful and effective in protecting your interests in land during disputes. However, it is important to talk with us early on to avoid the risk of incurring significant liability if they are registered incorrectly. +

Property briefs

Impacts on property dealings during Covid

The country is now out of its second lockdown with Auckland and parts of the Waikato in Level 3 with the rest of the country sitting at Level 2. Given the current uncertainty with how we can get on top of the Delta strain outbreak, let's have a look at where this leaves us and our property dealings across differing alert levels.

The following information is correct at the time of publication. However, the government could change the rules at any time and we strongly suggest you seek up-to-date and tailored legal advice for your circumstances.

Moving, buying and selling

Under the current Level 3 restrictions you are allowed to change addresses. This means that you can settle your property transactions and move in to and out of your homes. If you are relocating from a region in a different alert level to the region you are moving to that move must be on a permanent basis, such as starting new employment, attending tertiary education, or purchasing or renting a new principal home. It also means that you can't travel for a holiday.

You will need to take evidence that you are crossing the border for a permitted purpose. You may need to take a copy of your sale and purchase agreement or tenancy agreement for your new home, and even



a copy of your employment agreement or letter of acceptance, if applicable.

Under Level 3 you can have a moving company assist you with packing and the heavy lifting, although the movers will need to socially distance from you. Your family and friends who are not a part of your bubble can't assist you with the move.

At level 2 you are able to have your friends and family help you in your move. Your moving company will still need to comply with social distancing rules and contact tracing.

Property inspections

Under Level 3 you may complete your pre-settlement purchase inspection. You can also arrange to view a prospective property, to rent or buy, provided that the viewing is on a one-on-one basis. It is recommended that you do these viewings via video from the property's online listing. If that is not an option, you will need to socially distance, wear a mask and sign in using your tracer app.

At level 2 your open homes will be restricted to 100 people, your real estate agent may decide to limit numbers further. You need to make sure you are contact tracing and maintaining a 2-metre distance.

Landlords can inspect their rental properties during the revised Level 3 restrictions, but only with their tenant's consent. As a tenant you should only withhold your consent if you have genuine concerns about your safety.

Under level 2 you still need your tenants' consent before carrying out inspections or maintenance. Masks must be worn, and you should contact trace.

Rent relief for commercial tenancies

The government is also proposing an amendment to the Property Law Act 2007 which will make it compulsory for parties to negotiate and agree on a fair rent reduction where a tenant doesn't have access to their business premises. The amendment is currently going through its second reading, you can read the Bill [here](#).

The proposed amendment is similar to clause 27.5 of the ADLS lease which we discussed during the first lockdown in the Winter 2020 edition of *Property Speaking*.

Dispute resolution

Landlords and tenants, buyers and sellers are encouraged to talk to each other to reach an agreement on any issues that arise. Where this is not possible, your commercial lease is likely to detail a dispute resolution procedure which

you will be able to do so online via Skype, Zoom or by teleconference. For your residential tenancies, the Tenancy Tribunal and the courts are still operating via teleconference.

More information on the Covid restrictions can be found [here](#).

Using your property as an Airbnb

Coming into summer you may be thinking about letting out your holiday home or bach through Airbnb. This can be a great way to cover your property expenses over the summer months or to fund your own holiday – if you know what you're getting into.

Before you go down the Airbnb route, you need to make sure that you understand the differences between a residential tenancy and an Airbnb arrangement. Otherwise, you may need to comply with the Residential Tenancies Act 1986.

This legislation applies to all tenancies for a person's occupation, except in the limited circumstances set out at section 5 of the Act. These include where the property is used for temporary or transient accommodation of up to 28 days, or where the property is let for the tenant's holiday purposes.

If the arrangement between you and your tenant falls outside the exception at section 5 then it will be a residential tenancy and you must comply with the legislative requirements. These include the healthy homes standards, having a valid tenancy agreement and restrictions on terminating the tenancy.

Come and talk to us before you fly into it to ensure that you don't get any nasty surprises. +

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