

MBP

MACKINTOSH BRADLEY & PRICE
INCORPORATING THE PRACTICE OF J.L. WOODWARD

Time well spent ...

ISSUE 5 | NOVEMBER 2010

Property Speaking

MACKINTOSH BRADLEY & PRICE Level 5, State Insurance Building, 88 Division Street, P.O. Box 8364, Riccarton, Christchurch 8440
Ph: 03-343 5880 | Fax: 03-343 5888 | E-mail: partners@mbp.co.nz | Web: www.mbp.co.nz

Welcome to the final edition of *Property Speaking* for 2010. We hope you find the articles of interest. If you would like to talk further about any of the stories covered in this newsletter please don't hesitate to contact us.

In this issue:

Lessons from the Canterbury Quake

Buying and selling property

Turn to the world section of your newspaper and almost every day it seems there is a report of a natural disaster: floods in Pakistan, volcanoes erupting in Indonesia, a tsunami in Samoa or landslides in the Philippines. That is, until 4.35am on Saturday 4 September 2010 when we had our very own natural disaster in our backyard – literally so for Cantabrians... CONTINUE

READING

Residential Tenancies Amendment Act 2010

Effective from 1 October 2010

The law affecting residential landlords and tenants comes under the Residential Tenancies Act 1986 (RTA). Important changes are contained in the amending legislation which came into force on 1 October 2010. We summarise some of the amendments... CONTINUE

READING

Property Briefs:

Abolition of gift duty: Implications for family trusts... CONTINUE

Encumbrances: What does the future hold?... CONTINUE

*If you do not want to receive this newsletter, please [unsubscribe](#).
The next issue of Property Speaking will be published in April 2011.*

DISCLAIMER: All the information published in *Property Speaking* is true and accurate to the best of the authors' knowledge. It should not be a substitute for legal advice. No liability is assumed by the authors or publisher for losses suffered by any person or organisation relying directly or indirectly on this newsletter. Views expressed are those of individual authors, and do not necessarily reflect the view of this firm. Articles appearing in *Property Speaking* may be reproduced with prior approval from the editor and credit given to the source.

Copyright, NZ LAW Limited, 2010. Editor: Adrienne Olsen. E-mail: adrienne@adroite.co.nz. Ph: 04-496 5513.

Lessons from the Canterbury Quake

Buying and selling property

Turn to the world section of your newspaper and almost every day it seems there is a report of a natural disaster; floods in Pakistan, volcanoes erupting in Indonesia, a tsunami in Samoa or landslides in the Philippines. That is, until 4.35am on Saturday 4 September 2010 when we had our very own natural disaster in our backyard – literally so for Cantabrians.

Twelve weeks on, after the turmoil that has followed, there are some lessons learnt about buying and selling property; lessons which are relevant to all natural disasters and to all New Zealanders.

Consult us before signing up to buy or sell a property

In the days following the Canterbury quake, buyers wanted to get out of contracts and sellers wanted to hold them to the transaction. Banks, which had agreed to lend, suddenly started adding conditions. Now the dust is settling (after 3000+ aftershocks and no doubt more to come) we are now including clauses in the Agreement to protect buyers or sellers. We can only do this, however, if we are consulted before you sign the contract. If you have finance as a condition in your purchase contract, the banks will not provide finance unless you can supply them with a certificate of insurance for full replacement value of the property. Banks are also requesting an engineer's report and assignment of the EQC claim from the seller to the buyer.

Get a building report

How a building will stand up to a natural disaster will depend on its construction. We recommend that buyers obtain a building report so they have the peace of mind of knowing the structural foibles of the property. As well, many insurance companies now require sighting a building report before they will agree to insure.

Get a geotech report

One of the features of the Canterbury quake was liquefaction where, particularly on sandy soils, sandy mud literally oozed to the surface. Coastal properties and expensive riverside properties were particularly hard hit in Christchurch. There are also plenty of examples in the city where the land has settled causing damage to buildings. Fortunately there was little slumping on the Canterbury hills; but in parts of New Zealand there will obviously be questions of land instability after storms and floods. A report from a geotechnical engineer will identify those risks to help buyers to make an informed decision. In any event, as a result of the Canterbury experience, banks are often now requiring a geotechnical report before they will agree to lend.

Get a LIM from your local authority

A Land Information Memorandum (LIM) is an extract from your local authority's records of all matters relating to an individual property. Although obtaining a LIM has been common practice when purchasing a property, in the past few years some buyers have cut corners (and costs as they are not inexpensive) by not getting a LIM. We believe that this is unwise and recent events in Christchurch have confirmed that a LIM should be scrutinised with great care to identify potential hazards such as flooding or known or potential instability.

Finally, work with your lawyer

Working as a team with us when you are buying or selling property is now more important than ever so you, and your investment, are protected.

For sellers that might mean obtaining your own LIM and other reports to address any shortcomings the property may have, unstable chimneys for example.

For buyers, once you decide on the property you want to buy there are steps to be taken – obtaining reports, passing those to your insurer to obtain cover, satisfying the bank that the insurance cover is in place and so on.

A particularly important step for a buyer is to make sure that any claim the seller has with the EQC or their insurance company can be assigned to the buyer upon settlement. A deed of assignment of an EQC claim and an assignment of the insurance claim must be signed by both parties. We can draw up these documents for you, but we must be given details of the claim at the beginning of the contract.

A few extra precautions at the outset will turn what could potentially be an unpleasant experience into a safe and secure transaction. So, let's work together because together it works.

The Canterbury quake will not necessarily be the most damaging natural disaster this country suffers but it has provided a wakeup call for all New Zealanders to be more vigilant in their property purchases. Following a few simple steps will go a long way to avoid problems if you and your property happen to be in the wrong place at the time.

Residential Tenancies Amendment Act 2010

Effective from 1 October 2010

The law affecting residential landlords and tenants comes under the Residential Tenancies Act 1986 (RTA). Important changes are contained in the amending legislation which came into force on 1 October 2010. We summarise some of the amendments below.

The RTA imposes responsibilities on both landlord and tenant. Any breach of these obligations can be brought before the Tenancy Tribunal which can make a decision penalising the party in the wrong. This legislation also contains mandatory residential tenancy provisions that cannot be changed, even by agreement between landlord and tenant, for example, a bond payment must be held by the Bond Centre. A new and very important provision in the RTA is:

A landlord who is out of New Zealand for longer than 21 consecutive days must appoint an agent in New Zealand. The landlord must notify the tenant of the agent's details and, if a bond is held, the Bond Centre.

Some of the other more significant changes in the new legislation are explained below.

The definition of letting agent has been expanded beyond real estate agents to include property managers and any other person who is in the business of arranging the rental of residential property. A letting agent can charge a fee.

Address for service: landlords and tenants must supply a physical address in New Zealand as an address for service. They may supply an additional address in the form of a post office box number, e-mail or fax.

Tenancy agreements on unit title properties are now subject to the body corporate rules.

Refund of bonds: new provisions apply to obtain a refund from the Bond Centre, for example, applications for the payment of a bond without the agreement of the other party.

Landlord's right of entry: expansion of the grounds for a request by the landlord for entry. For example, entry with the prior consent of the tenant, for showing the premises to prospective tenants, purchasers, a registered valuer, real estate agent or building inspector. The penalty for a breach by the landlord increases from \$500 to \$2,000.

Death of sole tenant: whether there is a fixed or periodic tenancy it can be terminated by 21 days written notice given either by the landlord, or by the next of kin or the personal representative of the deceased tenant.

Unlawful acts by a tenant:

- » A tenant's failure to quit the premises at the end of the tenancy without reasonable excuse
- » Interference with the means for fire escape
- » Use of the premises for an unlawful purpose
- » Harassment of other tenants or neighbours
- » Exceeding the maximum number of residents as stated in the tenancy agreement, and/or
- » Assigning or subletting a tenancy without the landlord's consent.

Unlawful acts by the landlord:

- » Failure to comply with obligations regarding cleanliness, maintenance and repair, relevant building, health and safety regulations
- » Interference with supply of services such as gas, electricity, water and telephone, and
- » Unlawful acts can be grounds for applying to the Tenancy Tribunal for exemplary damages, the amounts of which are set out in a schedule to the Act.

Abandonment of goods: new extensive provisions apply which set out the procedure for dealing with goods left by a tenant.

Boarding houses are now covered by the RTA with provisions specific to these. A boarding house is defined as residential premises occupied by six or more tenants who each have exclusive rights to particular sleeping quarters in the boarding house.

The Tenancy Tribunal's jurisdiction is increased to \$50,000. There are also various increases in other financial penalties, as well as changes in notice periods. There are also changes to termination provisions, which should be read in detail.

It would be wise for any landlord to obtain a reprinted copy of the RTA, which will include the amending legislation, in order to become familiar with the new provisions. Luckily the RTA is one of the easier statutes to understand. Help is also available from various sources including the Department of Building and Housing, Tenancy (www.dbh.govt.nz), community law centres and bodies representing landlords.

The right to have a lawyer represent you at Tenancy Tribunal hearings is limited. We can, however, help you with your understanding of the facts and the matters that can be argued before the Tribunal, as well as assisting in writing your submission.

Property Briefs

Abolition of gift duty: Implications for family trusts

The announcement in October that the government intends to abolish gift duty will affect all people with current gifting programmes in place after the transfer of ownership of property into a family trust. It is expected that the legislation will take effect from 1 October 2011.

The government has signalled that the major reason for abolishing gift duty is that relatively little tax is raised (about \$4 million) through gift duty relative to the total compliance costs of maintaining an annual gifting programme.

The government's announcement has been hailed to some extent in the media since the current gift duty threshold of \$27,000 per year means that it can take many years and even decades for the debt remaining after the transfer of a family home into a trust to be completely gifted to the trustees of the trust.

Notwithstanding the media hype, it is important to note that until the legislation is passed it is impossible to comment on exactly what the effects will be on existing gifting programmes and the legalities of transferring assets to a family trust. Each trust and its respective arrangements will need to be reviewed on their merits. In some instances it may be beneficial for an individual taxpayer to continue to retain some or all debt rather than completing the gifting programme.

If you have transferred your family home into a family trust and currently maintain an annual gifting programme, we will keep you abreast of developments. Once the legislation is in place we will contact you as to how it relates to your particular trust circumstances. In the meantime, if you have any queries, please contact us.

Encumbrances: What does the future hold?

The Law Commission has recently made recommendations for a proposed new Land Transfer Act to replace the current Land Transfer Act 1952. The government hopes to introduce the Bill to the House next year. One significant change in the latest draft is the exclusion of provisions dealing with the registration of memoranda of encumbrances.

A memorandum of encumbrance is a charge registered over a property's certificate of title which creates a security interest over that property in favour of a third party for the performance of an obligation. The most common memorandum of encumbrance is one that is registered to secure the payment of levies or membership of a group of property owners in a housing estate.

It is unclear at this stage whether memoranda of encumbrances have been forgotten or omitted deliberately. The New Zealand Law Society (NZLS) has said that these encumbrances should be retained in the new legislation as contained in their submission to Land Information New Zealand (LINZ).

In its submission, the NZLS used an example where individual owners in a development are required to join a residents' or homeowners' society or association and contribute funds, usually on an annual basis, to the maintenance and upkeep of the development. An encumbrance instrument is usually registered against each individual owner's certificate of title to their property creating a charge over the property to secure the future payment of such levies generated by the society or association.

At the very least, should encumbrances be omitted from the new legislation, it is suggested by the NZLS that provisions should exist in the new legislation which deal with existing encumbrances, discharge of encumbrances and the ability to deal with parties who have entered into prior arrangements to create an encumbrance.

It is hoped that the Law Commission revisits the proposed new legislation in relation to the future of encumbrances. We believe, at the very least, that the legislation should provide, at a minimum, some workable provisions to deal with existing encumbrances and prior arrangements to create encumbrances so that owners in a development will have some comfort their interests are protected.