

Property Speaking

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ISSUE 46 | Winter 2024

Welcome to the Winter edition of *Property Speaking*.

We hope you enjoy reading this e-newsletter and that you find the articles to be both interesting and useful.

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



Commercial leases

Reinstatement obligations for tenants

There are many rights and obligations that affect both tenants and landlords at the beginning, during and at expiry or earlier termination of a commercial property lease.

The obligations on a tenant to reinstate the premises are usually set out in the ADLS Deed of Lease: these are important terms for both tenants and landlords to understand. Essentially the tenant is obligated to return the premises to the landlord in the same condition and state that it was in at the beginning of the lease.

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Pre-settlement property inspection

The week before settlement

When buying a property, you are usually entitled to one pre-settlement inspection. This inspection is typically done during the week before settlement, although it can be completed at any time.

Any claims for compensation that may arise from a pre-settlement inspection must be raised with the seller no later than 5pm the working day before settlement.

We explain why you should do this before you settle, and remedies if you find things that should be fixed.

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Property briefs

Finance condition in the agreement

This is the most common condition that buyers use in an Agreement for Sale and Purchase. As a buyer, you are likely to have sufficient funds for a deposit but lack the necessary funds to buy your dream home in full. A loan (mortgage) is needed to make up the difference.

LIM condition

Many buyers use this condition to find out essential information about the property.

Building report condition

Carried out by a building inspector, the building report outlines structural and weathertightness issues (amongst other things) relating to the property.

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Commercial leases



Reinstatement obligations for tenants

There are many rights and obligations that affect both tenants and landlords at the beginning, during and at the expiry or earlier termination of a commercial property lease.

The obligations on a tenant to reinstate the premises are usually set out in clause 20.1 of the ADLS Deed of Lease¹ and are important terms for both tenants and landlords to understand. Essentially the tenant is obligated to return the premises to the landlord in the same condition and state that it was at the beginning of the lease.

Tenants be careful before undertaking work

It is crucial that tenants understand their obligations before undertaking any work, and that your landlord must approve any alterations in writing. Having written approval does not mean that you won't be required to remove any fixtures or alterations that have been made to suit your business needs or use of the space.

However, it is not an automatic requirement for you to reinstate the premises. Only where your landlord requires it to be reinstated does this obligation apply to you.

If your landlord does require reinstatement of the premises, you have a number of things to consider when deciding whether to make

any alterations to complete a customised or business-specific fitout. These include the cost of potentially having to remove fixtures or reverse alterations, the benefit that any such alterations or fitout will have for your business, the length of your lease and/or how many rights of renewal there may be. These aspects of the lease are essential for you to consider before you complete any works given that you may be required to reinstate the premises.

As a tenant, you also need to understand that any reinstatement is entirely at your cost, and any fixtures or fittings you do not remove by the expiry or termination of the lease may become your landlord's property without any need for them to compensate you.

Further to this, any cost that your landlord incurs in removing your fixtures or fittings or carrying out reinstatement work you have not completed can be recovered from you by your landlord.

Finally, you must also repair any damage caused in the process of removing your fixtures and fittings from the premises. This can be problematic if you have completed significant structural alterations where reinstatement may be difficult or even impossible to complete without causing some damage to the building or premises you are vacating.

Disputes

Where a dispute arises about the cost or compensation claimed by either party to the lease for reinstatement or damage caused in the process, the default position in the

lease is that the parties submit the dispute for arbitration.²

Arbitration can be a costly and drawn-out process so having a firm grasp on obligations around reinstatement either at the beginning of the lease or before undertaking any fitout works or alterations is absolutely essential. This is particularly important if you are considering significant alterations that could be costly to remove to reinstate the premises.

Take care

The proposed lease should be carefully reviewed. This includes the standard terms of the deed of lease³ as they relate to reinstatement and the dispute resolution process and any specific terms or variations to the default terms which may reduce liability or impose stricter obligations on both parties.

Commercial leases can be tricky things and it's essential to get advice to avoid costly mistakes.

If you are a prospective tenant or landlord, we will work with you through this process. +



1 ADLS Deed of Lease Sixth Edition 2012 (5).

2 Clause 43.

3 Clauses 20 and 43.

Pre-settlement property inspection

The week before settlement

When buying a property, you are usually entitled to one pre-settlement inspection. This inspection is typically done during the week before settlement, although it can be completed at any time.

Any claims for compensation that may arise from a pre-settlement inspection must be raised with the seller no later than 5pm the working day before settlement; we recommend the inspection is completed two to three days before settlement. The inspection is arranged with the real estate agent, who is usually present during the inspection.

Why an inspection?

The purpose of the inspection before settlement day is to ensure that the property is in the same condition as it was when you signed the agreement, and that

all chattels included in the agreement are in good working order.

The pre-settlement inspection is not to raise issues with the property that existed at the time the agreement was entered into. If there were repairs or maintenance problems that were present before the agreement was signed, they should have been negotiated as part of the agreement in the first place.

What to look for?

Key items to check as part of the pre-settlement inspection include:

- + Electrical items, such as lights and power plugs, all work
- + The plumbing is in good working order, for example, all the taps turn on and the sinks drain
- + Testing the oven and hob turn on and heat up

- + Ensuring the dishwasher will turn on and run
- + Checking kitchen extractor and bathroom ventilation fans operate
- + Confirming that heat pumps' heating and cooling settings function, and
- + Ensuring the garage door opener works.

If the seller has agreed to complete any maintenance or repairs to the property as part of the agreement, both parties should confirm that this has been completed. You should also check for any new damage to the property, such as damage from the seller moving out of the property.

What to do if something is wrong?

The buyer should not notify the seller directly; this should be managed by the real estate agent and us. You should also notify us as soon as possible that there is a problem. We will advise the best approach to resolve the issue and will discuss this with the seller's lawyer within the time frame required by the agreement – usually no later than the working day before settlement.

If the seller agrees to remedy the issue before settlement, you are entitled to re-enter the property no later than the day before settlement to confirm that the work is completed.

Sometimes, due to the nature of the problem or the time required to remedy the issue, it is not possible for the seller to rectify it before settlement day. In that case, you may both agree to either:

1. Reduce the purchase price by an agreed amount and you will complete the necessary repair work yourself, or

2. We may retain funds in our trust account while the seller completes the work, with the funds paid to the seller once the work is completed (or returned to you should the seller not complete the work in the agreed time frame).

If the parties cannot agree on a negotiated resolution to the issue, we may be able to make a compensation claim on your behalf as per clause 10 of the agreement. These claims must be handled carefully and made the working day before the settlement date. The claim process can hold up settlement so it is important to consider if this is appropriate in your situation. We can advise you on the process of making a compensation claim and whether making such a claim is in your best interests.

Issues post-settlement

Even if the time period to raise a claim for compensation pre-settlement has passed, this does not negate the seller's warranties under the agreement.

If the seller has provided a warranty in respect of a chattel and you discover (after settlement) that the chattel is not in good working order, you may still be able to claim compensation from the seller. Any claim for compensation, however, will be outside the process set out in the agreement and any dispute relating to this compensation will usually be heard by the Disputes Tribunal (depending on the amount of the claim).

If you discover an issue post-settlement or outside of the timeframe for raising compensation claims pre-settlement, you should contact us for guidance on the next steps. +



Property briefs

The finance condition in the agreement

The finance condition is the most common condition included in an Agreement for Sale and Purchase for a buyer's benefit.



As a buyer you are likely to have sufficient funds for a deposit but lack the necessary funds to buy your dream home in full. A loan (mortgage) is needed to make up the difference.

Like all conditions, if the condition is contained on the front page of the agreement, you have a certain number of working days to satisfy it (and any other conditions). Once the conditions are fulfilled, the agreement becomes 'unconditional' and both parties eagerly anticipate settlement.

As with all required conditions, you must do all things reasonably necessary to satisfy the condition/s by the due date. You will need a formal loan offer and approval letter from your lender. Once obtained, we will notify the seller's lawyer that the condition is satisfied.

If not satisfied by the due date, the parties can cancel the agreement by giving each other notice. If you cannot satisfy the condition, the seller may request a satisfactory explanation as to why not. In other words, you must show all reasonably necessary steps were taken to obtain finance. In this situation, you could provide communications with your mortgage broker and lender, and provide evidence of having approached different lenders if your first lender declines finance.

LIM condition

The Land Information Memorandum (LIM) 'report' condition is another condition often included in the agreement for the buyer's benefit.

A LIM is prepared by the local council and is obtained at the buyer's cost. The LIM has information on the positioning of stormwater and sewerage pipes, whether there has been flooding in the area, drinking water quality, council rates, building certificates, consents and compliance, and special land features such as historical sites and sites which are significant to Māori. All this is worth knowing before buying a property.

If you are happy with the LIM, you can satisfy the condition by approving the report by the due date in the agreement. We will notify the seller's lawyer that the condition is satisfied.

If you do not approve the LIM (on reasonable grounds), you may have to give notice to the seller stating your reasons. The seller may agree to undertake remedial works to correct these concerns. If so, this condition will be satisfied. However, the seller can respond that they are unable, or unwilling, to do so. In this case, the agreement can be cancelled.

Building report condition

The building report condition is yet another condition commonly found in the agreement for a buyer's benefit.

A building report is carried out by a qualified building inspector; it is obtained at your cost. It can outline structural and weathertightness aspects (amongst other things) relating to the property. These could be, for example, moisture levels throughout the property, whether there are any loose wires, power sockets or other electrical issues, plumbing problems, whether the roof and exterior walls of the house are in good shape and so forth. The report must be in writing.

The seller must allow the building inspector reasonable access to the property. It is usual for you to arrange the inspection through the real estate agent.

If you are happy with the building report, the condition can be satisfied by approving the report by the due date. You can ask the seller to do any remedial work (at the seller's cost) for any problems raised in the report, or even use those problems as a means to negotiate a lower purchase price for the property. The seller does not have to agree.

If you cancel the agreement because you are dissatisfied with the building report, you may have to provide the seller with the report if the seller asks for it. +