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Property Speaking

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Welcome to the Spring issue of *Property Speaking*. We hope you find the articles interesting and that they are useful to you.

If you would like to talk further about any of the topics covered in this newsletter, please don't hesitate to contact us.

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Claiming a right or interest in a property

Caveat is a Latin word and, literally translated, means 'Let a person beware'. In the context of property, a caveat is a notice that is registered against the title of a property which serves to let anyone who searches that property's title know, or beware, that the caveator claims a right or interest in that land… CONTINUE READING

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Plan ahead

Trustees sometimes need to sign documents in a hurry. An example is bank mortgage documents which may need to be signed so that the trust can borrow to cover expenditure. If one of the trustees is away or cannot sign documents for some other reason, the obvious solution would be for someone else to be authorised to sign on behalf of the trustee… CONTINUE READING

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The next issue of Property Speaking *will be published in April 2013.*

Caveats

Claiming a right or interest in a property

Caveat is a Latin word and, literally translated, means 'Let a person beware'[1]. In the context of property, a caveat is a notice that is registered against the title of a property which serves to let anyone who searches that property's title know, or beware, that the caveator claims a right or interest in that land.

There are several types of caveats, the most common by far being caveats against dealings. Caveats against dealings prevent the property owner from dealing with that land until the caveator has had their claim resolved.

This is the same for a notice of claim of interest under s42 of the Property (Relationships) Act 1976 (PRA) which acts in a similar way as a caveat against dealings. A claim of interest under s42 of the PRA prevents an owner spouse from dealing with the land until relationship property rights have been resolved.

Caveats which prevent an owner from dealing with the land are most commonly registered to prevent an owner from selling the land, and are usually lodged to protect the following interests:

» Purchaser's interest under an Agreement for Sale and Purchase

» Mortgagee's interests under an agreement to mortgage

» Person's interest under an option to purchase

» Lessee's interest under and unregistered lease or an agreement to lease, and

» Beneficiary's interest under a trust who is entitled to an interest in land.

However, contrary to popular belief, a caveat cannot be registered simply because the land owner owes a sum of money. A caveat can only be lodged by people who have a right to lodge one. The right to lodge a caveat comes from the provisions of the Land Transfer Act 1952 which stipulates that a caveat can only be lodged against the title of a property by a person who claims to be entitled or beneficially interested in that land, or by someone who is transferring that land to be held on trust. These people have what is known as a 'caveatable interest'.

The following are not caveatable interests:

» Loan or debt agreements that do not contain an agreement to mortgage

» A guarantor's interest that does not contain an agreement to mortgage

» A shareholder's interest in the land owned by the company, and

» A bankrupt's interest in land formerly owned.

Caveats against dealings are serious tools and, once registered, can be difficult to remove. The simplest way to have a caveat removed is to get the caveator to do it. If the caveator is obstinate or refuses to remove the caveat then a court order is needed. Only the owner of the land or some other person who has an interest in the land can apply to a court to have the caveat removed. It's up to the person who lodged the caveat, and claims to have a caveatable interest in the land, to convince a court that the caveat should remain on a property title.

A caveat may also lapse upon the Registrar of Land receiving an application to register an instrument affecting the land, such as a transfer or mortgage. The Registrar must give the caveator notice of the lapse of the caveat. The caveat will be deemed to have lapsed unless the caveator obtains a court order to the contrary.

If a caveat is lodged without reasonable cause the person who lodged the caveat may have to compensate someone who has sustained damage or losses as a result of the caveat being lodged.[2] Reasonable cause for lodging the caveat may be shown if the caveator had an honest belief on reasonable grounds that they had a caveatable interest.

Please talk with us first before entering into an agreement you later want to rely on to support the lodging of a caveat. It will be less costly for you in the long run if you get it right the first time. ■

1 Concise Oxford Dictionary, 9th edition.
2 Section 146(1) Land Transfer Act 1952

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Signing on Behalf of Trustees

Plan ahead

Trustees sometimes need to sign documents in a hurry. An example is bank mortgage documents which may need to be signed so that the trust can borrow to cover expenditure. If one of the trustees is away or cannot sign documents for some other reason, the obvious solution would be for someone else to be authorised to sign on behalf of the trustee.

This simple solution, unfortunately, comes up against an important principle of trustee law. Trustees are appointed because the settlor – or whoever has power to appoint new trustees – trusted them to make good decisions. So it is the trustees who should make decisions. They should not hand that duty on to somebody else.

There is an important difference here between:

» Trustees appointing an agent to carry out decisions they have already reached, and

» Delegation, ie: handing over your role as trustee to somebody else.

Appointing an agent

Most trust deeds include a clause allowing the trustees to appoint an agent. This might be to collect rent, manage a property or negotiate a sale. If you expect an organisation such as a bank to accept a document that has been signed by an agent, then it needs to be clear that there is power under the trust deed for this to happen and that the agent is in fact carrying out decisions reached by the trustees. So the bank may want to see a resolution signed by each trustee.

If a trustee needs to delegate, ie: hand over authority as trustee for a time, then a deed of delegation is usually signed. The law only allows a delegation if the trustee is actually outside New Zealand or is temporarily physically incapacitated. The deed can be signed in anticipation of absence from the country or physical incapacity but the delegation is only effective while the trustee is overseas or incapacitated.[3]

Delegation

It's quite common for trustees to be advised to sign a deed of delegation like this. The person appointed, however, needs to understand that the delegation of the trustee's powers only takes effect while that trustee is overseas or physically incapacitated. Banks and other organisations need to know whether the delegation is effective if they are to rely on documents signed under delegation in this way. For example, the bank is unlikely to pay out money under a mortgage unless it knows the mortgage has been properly signed and is binding on the trustees.

If you expect that you are likely to be unable to sign trust documents in the near future, it's important to plan ahead. Resolutions and other documents should be signed in advance where possible. Deeds of delegation can be used to cover temporary physical incapacity or travel overseas, but they cannot be relied on if the trustee simply has difficulty getting into the office to sign documents. Trustees who are mentally incapacitated should normally be removed and replaced. Delegation is not appropriate in that situation. ■

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3 s31 Trustee Act 1956

Property Briefs

A landlord's responsibility to maintain property

Rental properties have long been a popular investment for Kiwis. While there are many advantages in owning rental properties, as a landlord you have some significant responsibilities. The Residential Tenancies Act 1986 sets out the rights and responsibilities of both landlords and tenants.

As a landlord you're obliged to ensure that during the term of the lease, your property is maintained in a reasonable state of repair having regard to the age and character of the property. You must also comply with the requirements of other legislation in respect to building, health and safety issues.

It may be unlawful if you don't comply with your obligations to maintain your property. It may also become expensive if a breach is established and your tenant brings a successful claim for losses in the Tenancy Tribunal. You would need to pay compensation to your tenant for reasonable expenses they may have incurred in having repairs carried out when you haven't done so in the required timeframe. In some situations your tenant may need to be accommodated elsewhere while work is being done, all at your cost.

We recommend landlords familiarise themselves with their obligation to maintain their properties. It's prudent to have a maintenance programme for each property and respond swiftly to any issues raised by your tenants. Otherwise, what started as something minor could become costly and stressful – for both you and your tenants. ■

Retirement villages: be familiar with the setup

In your later years of life, entering a retirement village may seem idyllic. You would expect a village to provide security, companionship, support and health care on-site, as well as removing the obligation to maintain and repair your own home. Retirement villages, however, do vary and there are a few things you should be aware of. The Retirement Villages Act 2003 is the law with which retirement villages and residents must comply.

Every retirement village must provide:

» *A disclosure statement* which provides the ownership, management, services, facilities, financial information about entry fees, on-going fees and exit fees

» *A cooling off period* (minimum 15 working days) in which you can cancel an agreement you have signed (the occupation right agreement) and receive your money back.

When considering a retirement village package you should be familiar with the following legal terms:

» *Licence to occupy:* gives you the right to live in a unit without ownership rights. This usually means you cannot borrow against or mortgage the value of your unit

» *Unit title:* confers an ownership interest to you. Some villages give you the option to become a body corporate member (you're responsible for the maintenance of shared areas)

» *Cross lease:* you share ownership of the land and its units, and you grant leases to one another to live there. Pay special attention to the lease agreement including information about the length of the lease and the use of the land, and

» *Lease for life:* gives you a lease which remains in place during your lifetime or until you leave the village.

When choosing a retirement village, ask for a copy of the village rules as these may include policies for visitors, pets, parking curfews, redecoration and additions to your unit, renting your unit and gardening. Talk to existing residents and find out if the village has a residents' association and if it meets regularly with management. You need to know that a village is financially secure and will continue to provide the accommodation, facilities and services that you pay for. Assess the village owner's reputation, whether the village's financial accounts are combined with other villages, what a village's insurance covers and what premiums and excesses are payable. Make sure you understand the entry and on-going costs including the cost of any on-going fees, who pays for outgoings such as rates, insurance, telephone and power and the policy for passing on increases costs.

Lastly, remember there are alternatives to retirement villages. You could modify your home with access ramps and rails, get home help, downsize to a smaller home, take a 'reverse mortgage' to free up capital, take in a boarder, or move in with your family or rent to free up your funds. ■

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